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JAMES D. MAHER

No. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

BUTTE & SUPERIOR COPPER COMPANY, LIMITED, a Corporation,

(Defendant) Appellant,

against

CLARK MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,

(Plaintiffs) Appellees.

BRIEF FOR APPELLANT, BUTTE & SUPERIOR COPPER COMPANY, IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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(Plaintiffs) Appellees.

BRIEF FOR APPELLANT, BUTTE & SUPERIOR COPPER COMPANY, IN OPPOSITION TO MOTION TO DISMISS APPEAL.

Delimiting the Question.

This appeal is from a decree of the United States District Court of Montana, affirmed by the Circuit Court of Appeals for the Ninth Circuit, adjudging

(1) Priority of "mining rights" through a seniority of *location* to plaintiffs' (appellees') Elm Orlu mining claim;

(2) Their ownership by virtue thereof of all of the "Rainbow" *vein* and its *ore bodies* throughout its entire depth lying between vertical planes of the Elm Orlu west end line and a line drawn parallel thereto through a point on the Elm Orlu's north

side line 301 feet east of such end line, as such planes are extended northerly and southerly in their own direction, thus including all of such vein and ores within these planes beneath certain mining claims of the defendant, and particularly within and beneath the surface boundaries of defendant's Black Rock claim;

(3) Also a like ownership for like reasons of certain portions of another vein and its ore bodies called the "Pyle Strand";

(4) Quieting plaintiffs' said titles against any claims of the defendant (appellant);

(5) Prohibiting and enjoining defendant from claiming or entering;

(6) Awarding a money judgment of $177,704.40 (and interest) as the value of ores extracted by defendant beneath its own surface and through its own workings from these ore bodies (Record, pp. 63–68).

In the opening paragraph of their brief, appellees (hereinafter called plaintiffs) stress the fact that this Court, on July 10, 1918, denied our application for a writ of *certiorari*. It is not unusual out of abundant caution, to seek review in this Court by both a writ of error (or appeal), and an application for *certiorari*. The latter must be applied for within the shorter period. But it enjoys a speedier hearing. Occasionally both proceedings have been before this Court at the same time. *Montana Mining Company, Ltd.*, v. *St. Louis Mining and Milling Company*, 204 U. S. 204. As the right to each is determined *independently* of the other (*Fields* v. *U. S.*, 205 U. S. 292), the fact that such an application has been made and denied is quite as immaterial, as is (*upon this motion only*), the other fact that one of the plaintiffs deeded to our predecessor part of our Black Rock claim within which lie the ore bodies now claimed by plaintiffs,—which latter fact they refer to as if the deed might have been to an interest in the Elm Orlu (their brief, p. 16).

We agree with plaintiffs that our right of appeal to this Court depends on whether the complaint states a federal question, or, to use the exact language of Section 24 of the Judicial Code, "a matter in controversy * * * (which) arises under the Constitution or laws of the United States". Another way of stating the question is: Had the complaint been filed without diversity allegations, could it have successfully withstood attack by demurrer for lack of jurisdiction?

Argument.

In moving to dismiss this appeal plaintiffs are obliged to take these positions, namely:

> (1) That though they tried in their original complaint to allege federal questions, and though they expressly averred therein, under oath, that they had done so, and that they invoked the jurisdiction of the court on that second additional ground, they now say that they in fact failed to do what they then believed they had done;
>
> (2) That if, perchance, they then succeeded in sufficiently setting forth a federal question, nevertheless all the facts which disclose such federal question must be disregarded, because, as they say—and now say—the action was brought under a special statute of Montana, so limiting its scope as that all the averments in question were unnecessary.

We submit that both positions are as untenable as they are unfortunate.

I.

The complaint properly states federal questions.

To intelligently analyze the complaint, we should understanding the meaning of the statutory words "a matter in controversy * * * (which) arises under the Constitution or laws of the United States".

In Farbo v. Avery, 167 U. S. 570, 574, this Court said:

> "If from them [the questions involved] it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."

In the later case of Hopkins v. Walker (1917), 244 U. S. 486,[2] this Court said:

> "A case does not arise where an appropriate statement of the plaintiff's cause of action omitted to any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress."

A more detailed definition is found in Gold Washing & Water Co. v. Keyes, 96 U. S. 199 (followed and approved in the Shoshone case [295 U. S. 90], relied on by plaintiffs), in which case this Court said (p. 202):

> "This suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. * * * Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, * * * that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." (Italics ours).

The significant features of this definition are:

(1) That facts only and not the law questions arising therefrom are to be pleaded; and

---

[2] Answer to this is controlling as every question raised by the motion, as that term was used in this case.

(3) Even if but one of several controversies in the suit presents a federal question, jurisdiction attaches.

As to when the *construction* of a statute is involved, this Court, speaking through Mr. Justice Van Devanter, in *United States v. Patten*, 226 U. S. 525, 543, has said:

> "In the outset we are confronted with the contention that the decision is not based upon the construction of the statute. But to this we cannot assent. The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it."

Guided by these general definitions, we will take up the allegations of the complaint to determine what disputes or controversies are shown thereby.

Analysis of the Complaint.—Owing to the studied avoidance by plaintiffs (their brief, pp. 9–12) of many averments as to their alleged extra-lateral rights to ores beneath the surface of our Black Rock claim, and as to alleged trespass by us beneath our own surface; to their failure to distinguish sharply the fissure ores from the claims in which it is found; and to their refusal to notice averments as to *title* claimed by us, we cannot accept their summary as wholly complete or correct. By paragraphs, we submit the following corrections and supplements thereto, viz.:

"1." Also avers the discovery of a vein with one well-defined wall.

"11." Avers that the application for patent recited the discovery and location, but does not aver that it recited the recording.

"9" and "15." Each uses the patent survey description.

"14." Avers that the extended lease will expire December 31, 1918.

Otherwise accepting plaintiffs' summary as to paragraphs 1 to 17, inclusive, and also as to 21 and 27, we summarize the remaining paragraphs as follows (italicizing our own additions to plaintiffs' summary):

"18." The existence in the Elm Orlu claim of the apex of a vein called the "Rainbow", *which passed through its west end line and, easterly thereof, divided, one branch passing out and through the east end line southward of the Black Rock claim, and the other through the common side line into and across the Black Rock, and out through the latter's north side line.*

"19." The Rainbow was the discovery vein of the Elm Orlu *claim.*

"20." *In* its downward course *the Rainbow vein on a northerly dip passes under the Black Rock and four other claims of the defendant to the north of the vertical planes of their south boundary lines.*

"22." Defendant claims *an estate or interest* adverse to plaintiffs in the Elm Orlu claim, in the Rainbow vein, and in that part of such vein lying between vertical planes of the Elm Orlu end lines extended northerly in their own direction, "the exact nature of which claims is unknown to to the plaintiffs."*

"23." That said claims *and each of them are* false and groundless, *and are a cloud on the said plaintiffs' title and without any right, and defendant has no right, title, or interest in or to said claim of said Rainbow vein between the end line planes so extended of the Elm Orlu.*

"24." The jurisdictional value *separately for each the Elm Orlu claim, the part of the Rainbow claim within it, and the part of that vein to which defendant asserts title and claim.*

* Here, assuming to quote, plaintiffs use the singular "claim", instead of "claims", and perpetuate this singular feature in the summary of the next paragraph.

"25." Defendant's trespass on part of the Rainbow vein *beneath the surface of each the Black Rock and Elm Orlu claims between the latter's own line planes so extended* by means *of underground workings in its exclusive control which cut and intersected such vein*, and the extraction of ores *therefrom of value over $50,000*, the exact amount of which ore plaintiffs cannot ascertain save by discovery and *an accounting.*

"26." Defendant's threat to continue *its workings on the Rainbow vein and to thus extract all of the value thereof.*

The prayer is:

(1) That defendant be required to set forth the nature of its claim *to said portion of the Rainbow vein and to the Elm Orlu claim;* (2) for a decree determining all adverse claims of defendant; (3) adjudging defendant to have no interest or estate in the Elm Orlu or in the Rainbow vein between the planes described; (4) *quieting title to each thereof in plaintiffs;* (5) restraining the defendant from entering the said part of the Rainbow vein or from laying claim to any thereof; (6) *restraining the defendant from asserting any claim to the Elm Orlu claim or said portion of the Rainbow vein;* (7) for an accounting *and a judgment for ores wrongfully extracted and removed.*

Disregarding the averments of diverse citizenship, the following ultimate facts appear:

(1) That plaintiffs insisted on and invoked the jurisdiction of the United States Court because, as they expressly averred, the facts they were pleading involved the construction and application of certain specified mining laws of the United States;

(2) That plaintiffs and defendant were each asserting a claim of title to underground areas within the vertical planes of surface boundaries of the patented mining claim or claims of the other;

(3) The plaintiffs, owning the Elm Orlu claim, asserted extralateral rights between vertical planes of its end lines extended northerly in their own

direction to ore bodies under the surface of defendant's Jersey Blue, Silver, Admiral Dewey and Black Rock claims, claiming that these ore bodies lay within a north dipping vein (Rainbow), of which they had *an apex;*

(4) That the apex of the Rainbow vein entered the Elm Orlu through its west end line and within that claim divided, the southerly branch passing out through the east end line of that claim to the south of our Black Rock; the northerly branch passing out through the side line common to it and the Black Rock into and across the latter claim, departing therefrom through its north side line. (For map showing relative location of claims, see Record, p. 21.)

(5) That plaintiffs claim all the ore in both branches of the Rainbow vein between the Elm Orlu end line claims extended northerly indefinitely, including, therefore, all ore in the north branch beneath the apex of that branch crossing the Black Rock;

(6) That defendant, owning the Black Rock, claimed title to the same ore bodies and parts of the Rainbow vein, and had extracted part of these ores through its underground workings beneath the Black Rock surface;

(7) That a proper discovery was made and a proper marking of the boundaries in locating each the Elm Orlu and the Black Rock claims, but that the notices of location recorded for each were in form held void by the Supreme Court of Montana (in *Hickey* v. *Anaconda Copper Mining Company*, 38 Mont. 46); that such attempted location of the Elm Orlu was prior to that of the Black Rock; and that the former claim was held and worked continuously for more than five years from the date of its discovery.

(8) That the Black Rock patent was issued long before the application for patent on the Elm Orlu, and there was no *surface* conflict between the two claims as patented;

(9) That plaintiffs did not know the *exact amount* of the ore so extracted and did not know the *exact nature* of the claims that defendant was urging in support of the above claim to title and estate in the areas, veins and ores in question;

(10) That the claims of title so made by defendant (based on the recorded location notice and the patent of the Black Rock covering the surface beneath which lay the ores and part of the vein in dispute) constituted a *cloud* on plaintiffs' title;

(11) That defendant was going to keep on working and exhausting the Rainbow vein.

According as to the contentions springing from these facts are resolved, so must the areas, vein rights and ore bodies in dispute be awarded to the plaintiffs or to the defendant.

The Resulting Contentions.—The first and greatest of these contentions is priority—not of surface, but of subsurface, or "mining rights" so-called by the Court in the decree—as between the Elm Orlu and the Black Rock claims.

With *such priority* determined in its favor, defendant, on the very facts alleged in the complaint, and without either issue or other allegation, must be awarded all ore bodies within the vertical planes of the Black Rock side lines which are a part of the north branch of the Rainbow vein, regardless of whether that branch does or does not unite on dip with the south branch.

With *such priority* determined against it, it must lose, in like manner, all of the north branch ore bodies lying between vertical planes drawn parallel to the Elm Orlu west end line—one through the point where the footwall of that branch intersects the side line common to the two claims; the other drawn through the point where the hanging wall of the same branch intersects the same side line. The distance between the hanging and footwall of the north branch at the point of crossing of the common side line was actually 111 feet. True, the complaint does not show the width of vein; but it necessarily had some width, and it therefore became necessary to determine whether the rights of the plaintiffs extended to the point of intersection of the south wall of the north branch, with the common side line, or only extended to the point

of intersection of the north wall. This question would turn on priority of mining rights as between the two claims.

In addition, as plaintiffs' claim to ores belonging to that part of the *north* branch *apexing* in the Black Rock could only be supported by a union of the two branches on dip and above the ore bodies, such priority, if determined for the Elm Orlu, would also lose to defendant all of the last named ore bodies.

We purposely refrain from considering further consequences contingent on the actual, as distinguished from the alleged, course of the Rainbow vein, on strike or dip; on whether its apex was within one claim or the other; or on the possible multiplied apices for the south branch, some in each claim; because such consequences could not have followed without issue or further allegation (though these features all actually arose from contentions that defendant so later made based on its ownership of the Black Rock). We prefer to rest this argument on those consequences which unavoidably flow from priority under the averments of the complaint itself.

Law Questions affecting Priority.—In determining such priority upon the facts so alleged, the following law questions involving the construction or application of the Constitution or laws of the United States arise:

> **(1) Whether, under Section 2324, R. S., the noncompliance with a Territorial statute as to notice of location (Montana Extra Session Laws, 1873, p. 83, Appendix I, this brief), avoids the attempted locations of the Elm Orlu and Black Rock;**
>
> **(2) Whether, under Section 2332, R. S., a "holding and working", as alleged in paragraph 8 of the complaint, of ground not validly located, segregates, or creates mining rights, anterior to the patent entry, or whether it merely entitles the one so holding to claim a patent;**
>
> **(3) The extent under Section 2322, R. S., of the extra-lateral right in the North Branch of the Rainbow Vein north of the common side line of the two claims;**

(4) *The time when*, under Section 2332, R. S., the conclusive validation by patent of an otherwise actually invalid location shall take effect with respect to extra-lateral rights;

(5) Whether, under Section 2332, R. S., a later patent validation of the Elm Orlu location could circumvent the previous patent validation of the Black Rock location so as to take away rights already secured by segregation to the Black Rock. Or, in other words, which patent carried the prior mining rights and the ore bodies and portions of the Rainbow vein in dispute?

(6) Whether the location-validating statute of Montana (Sections 2292-3-4, Montana Revised Code of 1907)—itself assuming to be legislation under authority of the Act of Congress—if read as attempting to validate an earlier invalid location so as to give extra-lateral rights against an intervening patent to another claim, would not violate the Fourteenth Amendment of the Federal Constitution, and the provision conferring on Congress the exclusive right of disposal of the public lands.

(7) Whether, if so read, it would not oppose Section 2332 R. S., as modifying the effect of a federal patent.

Without arguing these questions, we shall merely indicate how they arise and why they involve the construction or application claimed.

The First Five Questions.—These may properly be considered together. The argument would be

(1) That both locations, the Elm Orlu and the Black Rock, were originally void;

(2) That there was no segregation and no extra-lateral or other rights acquired by either location or by "holding or working", until the patent entries;

(3) That as the Black Rock was the earlier patent, it gained, as of the date of its patent entry, the first segregation and thereby gained priority of mining rights; and therefore title to these ore bodies (as well below the union at depth, of the branches of the Rainbow Vein, as between the planes of the north and south wall of the north branch at the side line crossing), passed by the Black Rock, and not by the Elm Orlu, patent.

The determination of some of these questions might also incidentally involve the consideration of state law, but finally they would all be referable to the federal law or Constitution, determining the effect of a United States patent, or of acts of attempted location, or holding or working of the claim.

In *Wilcox* v. *Jackson*, 13 Peters, 498, this Court said (p. 517):

> "We hold the true principle to be this, that whenever the question in any court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States * * *."

See also

French Glenn Live Stock Co. v. *Springer*, 185 U. S. 47, 54.

Kennedy Mining & Milling Co. v. *Argonaut Mining Co.*, 189 U. S. 1.

In *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505 (cited by plaintiffs), this Court said (510):

> "A statute authorizing an action to establish a right, is very different from one which *creates a right* to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for *the thing to be decided is the extent of the right given by the statute.*" (Italics ours.)

In *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138 (while denying jurisdiction because the question was first presented by the answer), this Court (144) characterized as a Federal question

> "The proposition that the right given by section 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate,"

saying that "the *Federal question* now suggested did not emerge until the defendant set up its second defence", etc. (Italics ours.)

As late as June 10 of this year, this Court, in *Jim Butler Mining Co.* v. *West End Mining Co.*, 247 U. S. 450, speaking through Mr. Justice Van Devanter, said (454):

> "What in mining cases is termed the extra-lateral right, is a creation of the mining laws of Congress, and to learn what it is we must look to them rather than to some system of laws to which it is a stranger."

In *Hopkins* v. *Walker*, 244 U. S. 486 (a mining case), the complaint alleged in detail, as does the complaint in this action, the facts affecting plaintiffs' title and, as well, the location of the defendant. It also alleged that the determination of plaintiff's rights called for a construction of the Federal mining laws. The prayer was for the removal of a cloud caused by recording the location notices and that plaintiffs' title be quieted. This Court said (489):

> "Assuming that the allegations of the bill concerning the nature and validity of the plaintiffs' title and the existence, invalidity and recording of the defendants' certificates of location constitute a part of the plaintiffs' cause of action, it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court."

The question as to the validity, under section 2324 R. S., of an attempted location, made in disregard to a State statute regulating location notices, was avoided as early as the year 1907 by this Court in *Yosemite Gold Mining & Milling Co.* v. *Emerson*, 208 U. S. 25. The Court noticed the conflict of state court decisions upon

this point; and in refusing to decide it, came close to classing it as a Federal question when it said (31):

> "We thus dispose of the only question which could be held to raise a Federal question. Upon the other points made as to the McWhirter interest, we think this case presents no Federal question."

The only other case carrying such a question to this Court, so far as we know, is *Butte City Water Co.* v. *Baker*, *supra* (196 U. S. 119).

In *Haggin* v. *Lewis*, 66 Fed. 199, it was held, in a suit to quiet title to a placer claim, that a claim by defendant under a location made after the issuance of the placer patent, on a quartz vein known to exist before the application for the placer patent, involved an interpretation of the Federal statutes excluding known lodes from placer patents.

In *Cheesman* v. *Shreve*, 37 Fed. 36, it was held that when parties entering beneath the surface of another claim and extracting ores thereunder, justify a claim of extra-lateral right, the case involves a construction of the Federal mining laws.

The effect of "holding and working", under Section 2332, R. S., on priority as to mining rights claimed anterior to patent entry has never been determined by this Court.

Plaintiffs' Points.—Without attempting to apply them, plaintiffs refer to three general principles:

1. **That Congress has exclusive control of the disposal of public lands.**
2. **That a United States mining patent conclusively adjudicates compliance with territorial or state statutes as to location and recordation.**
3. **That the effect of such a statute cannot present a federal question. (Their brief, pp. 17, 18.)**

As general principles we do not question them.

The First Principle.—In no one of the five cases cited to this point was the state statute either authorized or

adopted by any Act of Congress. In each case, its application to public land would have opposed an Act of Congress. The exception announced in the last of these cases (*Utah Power and Light Co.* v. *U. S.*, 243 U. S. 389-405), covers the case at bar, as follows:

> "It results that state laws * * * have no bearing upon a controversy such as is here presented, *save as they may have been adopted or made applicable by Congress.*"

The Montana territorial statute as to location notice (Extra Session Laws of 1873, p. 83, attached to this brief as Appendix I and also quoted in full in *Hickey* v. *Anaconda Copper Mining Co.*, 33 Mont. 63-4) was authorized and "made applicable" by Section 2324, R. S. Congress was acting through its delegated agent, the Montana legislature. In *Butte City Water Co.* v. *Baker*, 196 U. S. 119, speaking of a later similar statute of Montana, more severe in its requirements, this Court said:

> "While, in the above sections, (Sec. 2324 and others) there is not that direct grant of authority to the State to legislate respecting locations as there is to miners to make regulations, yet there is a clear recognition of such legislation. * * *
>
> "* * * as an owner may delegate to his principal agent the right to employ subordinates * * * so it would seem that Congress might rightfully intrust to the local legislature the determination of minor matters respecting the disposal of these lands."

In the same case, the Court approvingly quotes Judge Lindley as follows:

> "State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of *regulations under these laws* than independent legislation." (Italics ours.)

The Second Principle.—The question here is, *when* that exclusive adjudication is deemed to have been made so far

as subsurface or extra-lateral rights are concerned—whether as of the date of the patent entry or of the earlier attempted invalid location. The object of proving a location anterior to the patent is to reach back to and thus preserve rights and priorities created by that location. If none were created there is nothing to which to relate and nothing to preserve.

The Third Principle.—The application sought to be made of the *Shoshone case* (177 U. S. 505) is incorrect. Speaking of the "right of possession" involved in an adverse claim suit under Revised Stat. § 2326, this court, in that case, said (509):

> "That right *may or may not* involve the construction or effect of the Constitution or a law or treaty of the United States. * * * So that in a given case, the right of possession *may* not involve any question under the Constitution or laws of the United States, but *simply* a determination of local rules and customs, or state statutes, or even only a mere matter of fact." (Italics ours.)

The Court was contrasting a question involving construction or effect of Federal law, with a question merely involving the "*determination* of a state statute", *i. e.*, what state law was in force or what it meant. Such a question, for example, as arose with respect to a miner's regulation in *Parley's Peak Silver M. Co. v. Kerr*, 130 U. S. 256.

But assume that the Act of Congress authorizing a local regulation or state statute had itself declared that disregard of such regulation or statute should render the attempted location void. Would any one question but that such result was an effect of an Act of Congress and not of the local regulation or statute? In the case at bar, we may and would argue that such result comes by force of § 2324 R. S.

The broad language used by way of illustration in the *Shoshone* case, cannot be tortured into a declaration that a question involving the construction of Federal law can

never arise upon any set of facts in which a state statute figures, however remotely. The cases may clear the situation.

In *Spokane Falls, etc., Ry. v. Gaylor*, 167 U. S. 57, this Court summarized the complaint as alleging in substance that while plaintiff was occupying as a pre-emptor entitled to a patent but not having one, plaintiff (a railroad corporation of Washington) appropriated a strip of his property for railroad purposes without compensating plaintiff, and entered under the laws of Washington authorizing railroad companies to appropriate land for right of way. It then said (p. 59):

> "We have judicial knowledge that the authority of the territory to legislate, in respect to the right of a territorial railroad corporation to enter upon public lands of the United States, was derived from the Act of Congress * * * approved March 3, 1875 * * *, whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory. The plaintiff's complaint therefore discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an Act of Congress; and of such a case the circuit court for the District of Washington has clearly had jurisdiction. *Shoshone v. Carr*, 148 U. S. 424, 430; *Clarke v. Avery*, 167 U. S. 313."

In the foregoing case, the state statute was plead as the direct justification for the entry and seizure. Not only was there no allegation that the railway company was justifying under the Act of Congress, but there was no reference thereto; and yet the Court held that the interpretation and application of the railroad right of way Act of Congress was involved.

In *McClure v. Ewing*, 149 U. S. 369-370, the opinion states that the complaint disclosed the following facts: That the wife of a deceased homesteader (who had died before its final entry) herself perfected the title to the homestead and sold the land; and that plaintiff was a

[illegible] [illegible] [illegible] [

a state statute enters into the fact picture, but soon the law is the construction and application of the Federal Constitution and law involved.

Effect of Plaintiffs' Failure to Plead Our Reasons for Claiming Title.—Plaintiffs now urge that their own statement that they did not know the "*exact nature*" of our claim to title precludes the existence of a Federal question. That argument does not lessen the force of the allegation that defendant, having patent title to the Black Rock, was claiming title to all the disputed oil bodies beneath its surface. The entire allegation amounts to this, that while they know defendant is claiming what, over title, rights or estate the law gives him, they do not know the "*exact nature*" of the reasons he will urge in support of those claims.

Plaintiffs also plead they do not know the "*exact amount*" of the [illegible]. As the latter averment does not negative the fact that one was ascertained, so even does the former negative the fact that we were claiming title to those oils beneath the surface of our Black Rock claim. They were bound to know that we could and would in support of our claim assert any reasons warranted by the law upon the facts they knew to exist, as to the location, recording and patenting of those claims.

True, it was not in terms alleged that we would claim priority. This was not at all necessary, nor was it necessary to refer, as plaintiffs did, to the Federal statutes, the construction and application of which they averred was involved on the facts as they were afterwards alleged in the bill.

II.

Materiality of averments as to Black Rock and as to extralateral rights of Elm Orlu.

The *Hickey case, supra* (33 Mont. 46) forbade plaintiffs maintaining priority of mining rights for their Elm Orlu claim in the *state* courts. Should the two United States Courts follow that case, priority would be forever lost to plaintiffs, unless they could reach this Court. To keep that path open, they purposely framed their complaint to show Federal questions, and gave it as broad a scope as possible.

Mindful that they were not suing for ore extracted beneath their own surface, but rather beneath surface patented to defendant by patent *earlier* than their own, they plead those facts; also the course on strike and dip of the apex of the ore-carrying vein and its branches; and finally, their own prior discovery, marking of boundaries and record (attaching copy of the latter to the complaint), so as to make the question of priority one of law on the face of the complaint. The advantage of this course, as already pointed out, was that it permitted them to take the opinion of this Court on the question of priority should the lower Federal courts follow the Hickey case. Had those courts so acted, plaintiffs would have used the Federal questions thus developed as a basis for an appeal to this Court, and would be making to this Court the very argument in support of that appeal that we are here presenting.

However, having persuaded both those Courts to disregard the Hickey case, they now desire, very naturally, to hold the priority decreed them, and to have the Circuit Court of Appeals decision in their favor declared final. To get rid of their detailed allegations disclosing these Federal questions, they now urge that this action was for the sole purpose of determining an adverse claim of defendant to plaintiffs' Elm Orlu claim, and brought under a state statute (quoted in their brief, p. 2), which had

been interpreted by the Supreme Court of Montana as requiring allegation merely of (1) ownership and possession of realty; and (2) that defendant claimed of an adverse right by defendant thereto, with prayer for disclosure of the nature of the claim and for its determination (their brief, pp. 13 and 14); and that all else averred in the complaint is surplusage and cannot be considered to develop a Federal question.

Their present argument is weakened by their present interest. It is also without merit.

In addition to disclosure and determination of an adverse claim, they sought removal of *cloud* created by the Black Rock location notice and patent on their alleged extralateral rights beneath Black Rock surface, a perpetual injunction protecting such rights, an accounting for ores extracted, and, finally, a *money judgment for the value of those ores.*

While the State Supreme Court has so ruled as to a purely statutory action, *i. e.*, one seeking *solely* the statutory relief, it has also ruled—and in the very cases cited by plaintiffs—that an action like the present one is composite and carries causes other than the statutory.

In *Montana Ore Purchasing Co.* v. *Boston & Montana Consolidated Copper and Silver Mining Co.*, 27 Mont. 289, that Court, speaking of a complaint for damages for underground ore trespass, also for determination of adverse claim and for an injunction, said (304, 305):

> "The first or *legal* cause of action stated was for damages for ores already extracted and converted by the defendant. This was *wholly independent* of the cause of action stated in the second count. * * * The second cause of action was designed to obtain a *different character of relief*, namely, a determination of the adverse claim of the defendant," etc. (Italics ours.)

While plaintiffs refer to the ore trespass feature as *incidental* to their statutory cause, that Court has positively ruled in the above case that it is an *independent* legal cause of action not within the contemplation of that

special statute, and that the sufficiency of the allegations must be measured by an entirely different standard.

In *Merk* v. *Bowery Mining Co.* (31 Mont. 298) the complaint covered (1) quieting title; (2) removal of cloud; (3) injunction. Of it the Court said (309):

> "An examination of the complaint discloses that it was filed to quiet plaintiff's title to the premises in controversy, to remove a cloud therefrom by cancellation of instruments which they say have no validity, and incidentally for an injunction against the prosecution of two suits * * *. There is no doubt but the allegations of the complaint are sufficient as an action to remove a cloud from plaintiff's title and cancel the contracts of August 15, 1899, etc. * * * We are of the opinion that it is *also* sufficient to warrant a decree quieting title of plaintiffs against the adverse claim of the Bowery Mining Company * * *."

The limited allegations alone necessary for one phase of the complaint (the limited statutory relief) were of course not sufficient for the other phases, and the allegations developing the latter phases were both proper and necessary for the added relief so sought.

Plaintiffs cite decisions of this Court to the effect that *anticipatory* allegations as to what defendant may allege by way of defense (but constituting no part of the cause of action) should be disregarded.

The facts detailed in this complaint are not of that nature. If issue were joined thereon, each must be proven by plaintiffs to sustain the *burden* of *proof* that is on them to justify their claim to ores beneath the surface of another's claim.

This Court has repeatedly declared that persons entering beneath another's surface are *prima facie* trespassers, and that the burden of proof is on them to justify.

> *Montana Mining Co., Ltd.*, v. *St. Louis Mining & Milling Co.*, 194 U. S. 238-9;
> *Mammoth, &c.*, v. *Grand Central*, 213 U. S. 72-3;
> *Tyler* v. *Last Chance*, 171 U. S. 91;
> *Lawson* v. *U. S.* 207 U. S. 1.

E converso, one mining beneath his own surface is *prima facie* engaged in a lawful act, and another claiming rights therein against him assumes the burden of proof to justify such claim.

This Court, however, has itself very recently held against such contentions as are here made by plaintiffs, both as to the scope of the action, and as to anticipatory averments, distinguishing the Montana cases and applying the rule of the Merk case as in this brief. The complaint in *Hopkins* v. *Walker*, 244 U. S. 486, *supra*, was broader than that authorized by the Montana statute in that it also sought removal of a cloud. It was narrower than the complaint in the case at bar, in that the latter has, in addition to the cloud removal and title determination features, the ore trespass, accounting and injunction features. The allegations of the bill, strongly resembling in their detail those in the case at bar, are set forth in the opinion, in which this Court said (490):

> "But it is insisted that the allegations concerning the existence, invalidity and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action and so, for present purposes, must be disregarded. To this we cannot assent.
>
> In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title. * * * It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action.
>
> * * * * * *
>
> "The Supreme Court of Montana follows the California decisions, quotes approvingly from them and holds in respect of suits to remove clouds from title that 'the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff must suffer injury.' *Hicks* v. *Rupp*, 49 Montana, 40, 44-45; *Merk* v. *Bowery Mining Co.*, 31 Montana, 298, 309.
>
> "Thus whether we apply the general rule or the Montana rule, it is manifest that the allegations of

> the bill which it is insisted must be disregarded are material parts of the plaintiffs' cause of action, that is to say, they are important elements of the asserted right to have the recording of the certificates cancelled as a cloud upon the title.
>
> * * * * * *
>
> We are accordingly of opinion that the bill states a case arising under the mining laws of the United States and of which the District Court is given jurisdiction."

The above, while limited, because of the limitation of the case itself, to allegations affecting the removal of a cloud, is directly applicable also to allegations affecting the ore trespass feature in the present case. Each the cloud and the ore trespass is beyond the scope of the statutory action to within the limits of which the plaintiffs would now confine their complaint.

One or the other, the Black Rock patent or the Elm Orlu attempted location (followed by its later patent), segregated the mining rights in the north branch of the Rainbow vein at and northward of the point of crossing the common side line, and also carried the right to the disputed ore bodies. The title thereto passed by one patent or the other. Therefore, either the Black Rock patent clouded the Elm Orlu title thereto, or the Elm Orlu location and patent clouded the title of the Black Rock thereto. All the allegations showing the Federal questions are material and necessary for each the cloud removal and the ore trespass feature.

In the case at bar only the bald facts as to the condition of the title to the ground carrying these ores, are averred, with such additional facts as to vein conditions in that ground and in their own claim as will enable them to assert extralateral rights. Surely no one will contend that a plaintiff may not so state the ground conditions as to make the question of priority (in mining rights), as between two claims, turn solely upon questions of law. In this complaint plaintiffs have done no more. They were not quieting title merely to ore bodies within the Elm

Orlu surface boundary planes. Had that been the purpose of the action, no allegation regarding the Black Rock would have been necessary or proper. They were quieting title to outlying portions of the alleged Rainbow vein, as well as to defined ore bodies underlying the Black Rock, and also seeking a determination that their patent was the superior one, *i. e.*, prior in right, and a recovery of the value of such of the above ore as we had extracted. As they were entitled to a determination of those questions, it must follow that they were entitled to set forth facts from which they could contend that this Black Rock patent, though apparently older than theirs, did not give prior rights because of the further matters set up in favor of the Elm Orlu. For this reason it was also necessary to set forth the plaintiffs' own patent and location, and the early "holding and working" of the claim.

Moreover, there is not in this complaint any averment as to any fact, that defendant will in its answer claim that fact to be as so averred.

If we were to strip this complaint of all its allegations save the two formal ones alone necessary for the mere determination of an adverse claim, plaintiffs, under the rule of the *Boston & Montana* case, *supra*, could never have proven the facts necessary to sustain the money judgment against us.

Estoppel.—This brings us to another reason why they may not now so narrow their pleading. By the allegations which plaintiffs now ask this Court to disregard, and by the broad form of their action, they secured two benefits:

> (1) A money judgment for $177,704.40, and interest, for ores extracted by us from the disputed ore bodies beneath our own surface, which judgment we were forced to stay by supersedeas on this appeal and which they will compel us to pay unless we secure a reversal thereof; and
>
> (2) They tolled forward the right of appeal to this Court until they found out from the decision of the Circuit Court of Appeals that they no longer needed the benefit of appeal.

It being then to their interest to make that judgment and their title so decreed final, they have shifted their footing and are now insisting that those allegations essential to the money judgment and also disclosing the Federal questions were always surplusage and never properly in the complaint, because, as they now assert, the latter was filed solely to secure a determination of adverse claim under the narrow statute of Montana.

They ought not to be permitted to so gamble on the decisions of the lower courts or to play fast and loose in this manner in judicial proceedings. In *Cooke* v. *Avery*, 147 U. S. 375, a defendant who had relied, in the first trial, on the Federal question disclosed by the complaint, to defeat the action on its merits, was not permitted on retrial to deny the existence of that Federal question in order to defeat the jurisdiction of the court. This Court said (pp. 385-6):

> "On the former trial of this case the defendant contended that, under a proper construction of section 916 and the rules of the Circuit Court, the laws of Texas in force in 1873 governed the judgment lien under which plaintiff claimed title, and that by those laws the lien was lost because execution had not been issued each year prior to the issue of that on which the land was sold; while plaintiff contended that the statutes of Texas enacted in 1879 governed the lien, and under them the lien was not lost by failure to issue the execution each year.
>
> "It is now insisted by defendants that the latter is the true view, and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly, the right of a plaintiff to sue cannot depend upon the defense which a defendant may choose to set up, and as on the first trial defendants relied on the decision of a Federal question to defeat the action, such a concession of the existence of a Federal ingredient in the cause might fairly be held to bind them when they subsequently abandon it, and seek to oust the jurisdiction upon the ground that there could be no real dispute as to the applicable law."

In *Florida Central, &c., R. R.* v. *Bell*, 176 U. S. 326-7, this Court said:

> "As, then, the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on a construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different States."

See also *Davis* v. *Wakelee*, 156 U. S. 680.

Our Denial of Federal Question.

Plaintiffs devote the last two pages (16-18) of their brief to a consideration of issues raised by the answer. Though the answer is not before this Court upon this motion we have already considered every point thus raised save two.

The first—our denial of their averment of jurisdiction through Federal question, may be disposed of in a few words. The attempted issue never was and never could have been considered, because,

> (*a*) The denial was insufficient to raise an issue for lack of any averment that the jurisdictional allegations of the complaint were made in bad faith. *Simkins Federal Equity Suit*, pp. 163-166, and cases; and
>
> (*b*) The diversity allegations made the feature unimportant in the court below.

The second,—their assertion that our answer in fact raised no issue involving a Federal question (plaintiffs' brief, pp. 16-17)—was doubtless meant to reinforce their argument that no such question appeared on the face of the complaint. Whatever its purpose, it is glaringly inaccurate. Listing it as "Issue B" (their brief, p. 16), plaintiffs concede that the answer affirmatively advanced

"priority of mining right in the defendant's Black Rock lode over the Elm Orlu lode" as one ground for its claim of title. This affirmatively and again presented every Federal question we have enumerated in this brief. These questions, however, were already in the case upon the allegations of the complaint. Moreover, the briefs on file show the law questions on which the issue of priority was believed to turn, while the decree (see summary thereof in opening paragraph of this brief) shows that priority was the first and most important thing adjudicated and that all other matters adjudicated were based thereon.

Conclusion.

The complaint in this case, by its proper and necessary fact averments, discloses various important Federal questions. Therefore, the judgment of the Circuit Court of Appeals is not final. The appeal is properly in this Court, and the motion to dismiss the same should be denied.

Respectfully submitted,

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Counsel for Appellant.

Appendix I.

Copy of Montana Extra Session Laws of 1873, p. 83.

Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States.

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In the Supreme Court of the United States

October Term, 1918.

BUTTE & SUPERIOR COPPER COMPANY, LIMITED; A CORPORATION, (Defendant) Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, A CORPORATION, AND ELM ORLU MINING COMPANY, A CORPORATION, (Plaintiffs) Appellees.

Brief on Behalf of Appellant.

I.

STATEMENT OF CASE.

A.

This is a suit in equity to quiet title and for an accounting for ores mined by defendant and for an injunction. In the bill of complaint (Tr. pages 2-12) it is, among other things, alleged that the plaintiff, Clark-Montana Realty Company, is the owner of and that its co-plaintiff, the Elm Orlu Mining Company, is the lessee of, the Elm Orlu mining claim (which is laid in an easterly-westerly direction and in said complaint is

specifically described by metes and bounds); that on the 18th day of April, 1875, the predecessors in interest of plaintiff, Clark-Montana Realty Company, namely, M. McNamee, Charles E. Savage and I. C. Burkett, discovered in vacant and unoccupied public land a vein or lode containing silver, lead, copper, zinc and other valuable minerals, and thereupon located thereon the Elm Orlu mining claim, posting at the point of discovery a notice of location which contained the name of the claim, the names of the locators, date of location, number of lineal feet claimed along the course of the vein each way from discovery point, and the width claimed on each side of the center of the vein, and immediately sunk a shaft upon the lode which disclosed a vein of quartz and ore with one well-defined wall; that immediately after posting of notice, said locators distinctly marked the location on the ground so that its boundaries could be readily traced, and within twenty days after discovery they filed in the office of the County Recorder of the County in which the claim was situated, a declaratory statement in writing (a copy of which declaratory statement is attached to the complaint and marked Exhibit "A" and is found at Tr., pages 10-11); that thereafter said locators and their successors in interest held, worked, possesesd and actually occupied said claim continuously from the date of discovery for more than five years, during all of which time they were in the open, notorious, exclusive and uninterrupted possession thereof; that about June 1, 1880, the owners of the Elm Orlu claim abandoned a portion of the surface thereof (which portion is specifically

described in paragraph 10 of said complaint, pages 4-5, and is the surface area which was in conflict with the Black Rock lode claim owned by defendant); that during the year 1882 the then owners of the Elm Orlu claim filed in the proper United States Land Office, their application for patent for said claim, excepting that portion thereof so abandoned as aforesaid, and in their said application recited the facts with reference to the discovery and location of said claim and filed in said Land Office a copy of said declaratory statement; that the officers of said Land Office accepted said proof of discovery and location and said declaratory statement and on December 30, 1882, entry of said claim was allowed and Receiver's final receipt issued, and on the 31st day of January, 1884, the Commissioner of the General Land Office approved the act of said officers and issued United States patent to said owners of said claim; that on the 10th day of June, 1904, by mesne conveyances from the original locators of the Elm Orlu claim, the plaintiff, Clark-Montana Realty Company, became the owner of said claim and on August 18, 1906, conveyed an undivided one-half interest in said claim to W. A. Clark, Jr., who, on December 8, 1913, reconveyed said undivided one-half interest to said plaintiff, Clark-Montana Realty Company, and that ever since said company has been the owner, in possession of, and entitled to the possession of said Elm Orlu claim and all veins or lodes having their tops or apices therein throughout their entire depth between the end lines of said claim extended northerly in their own direction; that defendant, Butte & Superior Copper Company, is the owner

of the Black Rock, Jersey Blue, Admiral Dewey and Silver lode mining claims which adjoin the Elm Orlu claim on its north side; that subsequent to November 1, 1875, the predecessors in interest of defendant located the Black Rock claim and filed in the office of the County Recorder of the County in which said claim was located, a declaratory statement in writing, a copy of which is attached to said complaint and marked Exhibit "B"; that thereafter and prior to November 24, 1880, the locators of said Black Rock claim filed in the proper United States Land Office an application for patent for said Black Rock claim, based on said declaratory statement, and on said last mentioned date, upon payment by applicants for said claim, mineral entry thereof was allowed and final receipt issued, and on February 15, 1882, United States patent for said claim was granted to said owners; that within said Elm Orlu claim there is a vein or lode of rock in place bearing copper, zinc, etc., commonly known as the Rainbow lode, which at its top or apex crosses the west end line of said Elm Orlu claim, and thence, on its course, continues easterly through said claim, one fork of the apex of said vein crossing the east end line of the claim at a point south of the south side line of the Black Rock claim, and the other fork crossing the south boundary of said Black Rock claim at a point about 350 feet east of the southwest corner of said Black Rock claim, and thence continues to and across the north boundary line of said Black Rock; that the downward course of said vein is northerly and on its course downward between the end line planes of said Elm Orlu extended northerly in their

own direction, said vein passes underneath the surface of said Black Rock, Admiral Dewey, Jersey Blue and Silver claims; that the defendant claims an estate or interest adverse to plaintiffs in and to said Elm Orlu claim and in and to said Rinbow lode which lies between vertical planes through the end lines of said Elm Orlu claim extended northerly in their own direction; that said adverse claim of defendant is false, groundless and a cloud on plaintiff's title; that that portion of said Rainbow lode to which defendant wrongfully asserts title and claim exceeds in value the sum of one hundred thousand dollars ($100,000.00) exclusive of interest and costs; that subsequent to March 1, 1910, while said Clark-Montana Realty Company and said W. A. Clark, Jr., were the owners thereof, and also since December 18, 1913, while said Realty Company was the sole owner of said claim and vein, the defendant did, by means of secret underground workings, wilfully penetrate into and upon those parts of said Rinbow lode which lie between the end line planes of said Elm Orlu claim and beneath the surface of said Elm Orlu and Black Rock claims, and did extract and remove from said vein and appropriate to its own use, ores and minerals exceeding in value fifty thousand dollars ($50,000.00); that on the 15th day of December, 1913, said W. A. Clark, Jr., assigned to said Realty Company all causes of action which he had against defendant on account of ores mined and taken by it from said lode.

B.

Defendant's answer (Tr., pages 13-26), contains, among others, the following denials and allegations:

Denies that on the 18th day of April, 1875, or at any time, the said McNamee, Savage and Burkett, or either of them, located a claim upon any vein or lode within the limits of the alleged Elm Orlu claim.

Admits that said named persons, on the 22d day of April, 1875, filed in the office of the County Recorder of the county in which the alleged Elm Orlu mining claim was situated, an alleged declaratory statement in writing, and that the paper marked Exhibit "A," attached to the bill of complaint, is a true copy thereof.

But alleges that said alleged and purported declaratory statement is fatally defective in that it appears from the face thereof that it fails to comply with the statutes of Montana. (Namely, the first section of an act of the legislative assembly of the Territory of Montana, approved May 8, 1873, and entitled "An Act providing for the location and recording of Mining Claims on Veins or Lodes") which said act remained unrepealed and unmodified until long after the final entry of the Elm Orlu mining claim in the patent proceedings, to-wit: the 30th day of December, 1882; and further alleges that neither of the alleged locators of said mining claim, nor any of the successors in interest of them, or either of them, filed or caused to be filed in the office of the County Recorder of the county in which said alleged claim was situated, any other declaratory statement than that mentioned in said bill. And that, by reason of the failure of the said alleged locators or either of them, or their, or either of

their successors in interest, to file in the office of the Recorder of the county in which said alleged claim was situated, any declaratory statement such as is required by the provisions of Section 1 of said act, the alleged and attempted location of the said Elm Orlu mining claim was null and void, and neither of said alleged locators nor any of the successors in interest of them, nor either of them, ever acquired any estate, right, title or interest whatsoever in any part or portion of said alleged Elm Orlu claim by virtue of said attempted location; but admits that by the issuance of patent mentioned in the 12th paragraph of said complaint, it was conclusively determined that at the time of the final entry of said claim, to-wit, December 30, 1882, said Elm Orlu claim was a valid and subsisting mining claim.

Denies that the said alleged locators of the alleged Elm Orlu or any of them, or any of the successors in interest of them, or either of them, held, worked, possessed or actually occupied the Elm Orlu claim or any part thereof continuously from the date of the alleged discovery for more than five years thereafter, or for any other period of time.

And alleges that in the proceedings instituted in the United States Land Office for patent to said claim, and in all proceedings had in said Land Office, the right to patent was based upon the aforesaid alleged declaratory statement, and at no time in the said proceedings did the applicant for patent to said claim rely upon the provisions of Section 2332 of the Revised Statutes of the United States or any claim of adverse possession of said Elm

Orlu claim; that the failure in the present proceedings to assert or rely upon adverse possession of said claim does and ought to estop and preclude the plaintiffs and each of them from asserting any estate, right, title or interest in the said Elm Orlu claim, founded upon the claim of adverse possession thereof by plaintiffs or their predecessors in interest;

Denies that on June 1, 1880, or at any other time, any person or persons claiming to be the owner or owners of the alleged Elm Orlu claim ever abandoned any part of the surface thereof;

Denies that either of the plaintiffs or any of the predecessors in interest of them ever had any estate, interest or possession of, in or to any part or portion of the premises alleged in paragraph 10 of said complaint to have been so abandoned by the then owners of the alleged Elm Orlu claim.

Admits, answering the 11th paragraph of the complaint, that during the year 1882 the then alleged owners of the alleged Elm Orlu claim filed in the United States Land Office at Helena, Montana, their application for patent for said alleged Elm Orlu claim; but denies that before or at the time of filing said application said applicants were or that either of them was the owner or owners of said alleged claim, or that they or either of them had any estate, right, title or interest therein.

Further answering said 11th paragraph, admits that the applicants for said patent filed in said Land Office a copy of the alleged declaratory statement, of which Exhibit "A," annexed to said complaint, is a copy.

And further alleges that there has not been disclosed, nor is there known to exist, the top or apex of any vein or lode whatever within the limits of said Elm Orlu claim easterly of a plane parallel to the west end line of the claim drawn through a point 710 feet easterly thereof, except a vein which, on its course and at its top, crosses the southerly side line of the Elm Orlu claim at a point about 710 feet east of the west end line of the claim, and that so far as it has been developed or disclosed, it is not known to cross any other line of the claim.

Answering the 23d paragraph of the complaint, in which it is alleged that the defendant's asserted adverse claim is false and groundless, defendant specifically denies each and every allegation therein contained.

Defendant, in its answer (Tr., pp. 22-23), and as a separate defense to said complaint, alleges that on the 29th day of October, 1906, plaintiff, Clark-Montana Realty Company, then being the owner of an undivided one-fourth of said Black Rock lode mining claim, executed and delivered to the predecessors in interest of defendant its certain deed, a copy of which is marked Exhibit "A," attached to and made a part of the Answer (and will be found at Tr., pp. 27-28), whereby the said Clark-Montana Realty Company conveyed to said predecessors in interest of defendant the Black Rock lode mining claim, together with all the minerals therein contained and all veins, lodes and ledges therein. And defendant alleges that said plaintiffs are and each of them thereby is and ought to be estopped from now asserting

any right, title or interest, of, in or to any ores or minerals found within the Black Rock mining claim.

Further answering said complaint, and as a basis for affirmative relief in its favor, defendant alleges (Tr., pp. 22-25,) that it is the owner of, in possession of and entitled to the possession, and it and its predecessors in interest, ever since the 24th day of November, 1880, have been the owners of, in possession and entitled to the possession of the Black Rock mining claim (mentioned in said complaint) and of all veins, lodes or ledges throughout their entire depth, the tops or apices of which are found within the surface boundaries of said claim extended downward vertically (describing said claim specifically by metes and bounds); that on the 15th day of February, 1882, the Government of the United States, by its letters patent, granted and conveyed said Black Rock claim, together with all veins and lodes throughout their entire depth, having their tops and apices within the surface boundaries thereof, to William A. Clark, Joseph K. Clark, Henry S. Clark and John C. Belk; that subsequently, by mesne coveyances from said patentees of said Black Rock claim, this defendant became and now is the owner of said claim; that there is withinn the surface boundaries of said Black Rock claim a vein or lode of rock in place bearing gold and other valuable metals which at its top and on its course crosses the westerly end line of said claim and thence at its top and on its course continues in an easterly direction between the side lines of said claim for a distance of 818 feet from said west end line where said

vein forks on its course or strike, one branch thereof continuing easterly to and across the easterly end line of said mining claim, and the other fork or branch continuing in a northeasterly direction, to and across the north side line of said claim that said vein dips in a southerly direction, and on its course downward so far departs from the perpendicular that at depth it extends, for a portion of its width, to and beyond the southerly side line of said claim, and into and beneath the surface of said Elm Orlu mining claim; that defendant is the owner of, in possession and entitled to the possession, and it and its predecessors in interest, ever since the 24th day of November, 1880, have been the owners of, in possession and entitled to the possession, of said vein throughout its entire depth between planes drawn through the end lines of said claim continued indefinitely in their own direction southerly.

And in the 6th paragraph of the answer for affirmative relief (Tr., p. 24), alleges that defendant has never mined or extracted any ore or mineral bearing earth or rock from within the surface boundaries extended downward vertically of said Elm Orlu claim, except from that portion of said vein so as aforesaid having its top within said Black Rock claim, and which in its downward course lies for a portion of its width within the exterior boundaries extended downward vertically of said Elm Orlu claim;

And in the 7th paragraph of the answer (Tr., pp. 24-25), alleges that said plaintiffs claim some estate or interest adverse to defendant in and to said vein and in

and to the ores and minerals therein contained between vertical planes drawn between the end lines of said Black Rock claim extended southerly in their own direction, but that each and all of said claims of any estate, right, title or interest therein, are without merit, false and unjustified, and constitute a cloud upon the title and estate of defendant.

C.

Plaintiffs, in their replication (Tr., pp. 29-32), admit defendant's ownership of the Black Rock claim, but deny that the patent to said claim granted to the predecessors of defendant that portion of any lode or vein apexing within the surface boundaries of the Black Rock claim, which also apexes in the Elm Orlu claim, and allege that the latter claim is prior in date to the Black Rock.

Deny that there is any vein or lode within the surface boundaries of the Black Rock claim which at its top or at its apex crosses the westerly end line of said claim and thence on its course continues in an easterly direction between the side lines of said claim for a distance of 818 feet from said west end line; and deny that one fork or branch of the apex of any vein within the Black Rock claim crosses the easterly end line of said claim or that any fork of said vein continues in a northeasterly direction to and across the north side line of said claim.

But in this connection plaintiffs admit that there is one fork of the vein within the Black Rock claim known as the Rainbow lode which on its course crosses the south side line of said claim and thence continues northeasterly

to and across the opposite side line of the claim; but that neither fork of said vein crosses the easterly end line of the claim or the westerly end line thereof; and allege that one fork of said vein crosses the easterly end line of the Elm Orlu claim and that the two forks uniting within the Elm Orlu constitute one lode or vein which continues in a westerly direction to and across the west end line of the Elm Orlu claim.

Deny that any vein within the Black Rock claim which wholly or in part crosses the opposite end lines of the claim dips in a southerly direction, or that any such vein for a portion of its width extends beyond the southerly side line of the Black Rock claim.

And deny that there is any vein within the Black Rock claim which defendant is entitled to follow either in a southerly direction beyond its south side line, or in an easterly direction as against the said plaintiffs.

And deny specifically each and every other allegation of the 6th and 7th paragraphs of the answer.

(The pleadings are quite voluminous, but we believe that the foregoing will be found to embrace everything therein pertinent to or which has any bearing upon any of the questions arising on this appeal.)

D.

The taking of testimony having been concluded, the cause was argued by counsel for respective parties and submitted on the .... day of November, 1915. Thereafter, and on the 22d day of January, 1916, the court delivered its opinion in writing (which is found at Tr.,

pp. 39-61,) and on the same date made and filed findings of fact and conclusions of law, which were as follows: (Tr., pp. 33-34.)

"Herein the court finds:

"(1) That the Elm Orlu claim was located before the Black Rock claim was located;

"(2) That the north wall of the Rainbow vein apex crosses the common side line between said claims—190—feet from the southwest corner of the Black Rock claim, and that the south wall of said vein apex so crosses—301—feet from said corner;

"(3) That the Pyle strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim and there and for some indefinite distance easterly has its apex in the Elm Orlu claim;

"(4) That the Jersey Blue vein apexes in the Black Rock claim, does not unite with the Rainbow vein, and crosses on strike and dip the Rainbow vein on strike east of the Rainbow apex crossing of the common side line.

"(5) That the Creden vein diverges from the north side of the Rainbow vein in the Elm Orlu claim, and has its apex in both the Elm Orlu and Black Rock claims.

"(6) That the apex of the easterly strand of the Rainbow vein in the Black Rock claim, terminates at a point within said claim east of the Elm Orlu east end line projected and about—250—feet west of the Black Rock east end line.

"(7) That prior to the Black Rock location and patent entry, both the Rainbow vein and the Jersey Blue

vein at their apices were discovered and known within the Black Rock claim and at their apices appeared as a continuous east-west vein.

"(8) That each party has mined the ore bodies of the other in the claims involved.

"And therefrom the court concludes:

"(1) That plaintiff owns all ore bodies in the Rainbow vein between the Elm Orlu west end line and a parallel line projected from where the south wall apex of said vein crosses the common side line, or about 980 feet of said vein.

"(2) That the defendant owns all ore bodies in the Rainbow vein between the projected Elm Orlu end line at the south wall apex crossing of the common side line by said vein and the east end line of the Black Rock claim, or about 1200 feet of said vein.

"(3) That plaintiff owns all ore bodies in the Pyle strand from its divergence at its west end from the Rainbow vein in the Elm Orlu claim easterly as far as the apex of said strand is within said claim, and between Elm Orlu end lines projected, and defendant owns all thereof east of the projected east end line last aforesaid.

"(4) That defendant owns all ore bodies in the Jersey Blue vein between the points where the apex departs from defendant's premises across end lines as laid or projected, throughout depth, save at its intersection or crossing of the Rainbow vein between Elm Orlu end lines as laid and projected.

"(4-2) That plaintiff owns all ore bodies in the Creden vein from its divergence at its east end from the

Rainbow vein westerly as far as the Creden apex is within the Elm Orlu claim between Elm Orlu end lines there projected, and defendant owns all thereof west of the projected west end line last aforesaid.

"(5) That accounting in damages be had.

"(6) That each party pay its own costs, and the decision herein is made a part hereof. An appropriate decree will be entered."

That thereafter and on the 6th day of July, 1916, the account having been taken, the court entered its decree in said cause (Tr., pp. 34-38,) pursuant to said findings of fact and conclusions of law, and awarded plaintiff damages in the sum of one hundred seventy-seven thousand, seven hundred four dollars and forty cents ($177,704.40).

The opinion of the district court upon which said decree was based is to be found on pages 39-61 of the record in this court.

Thereafter the said cause was appealed to the Circuit Court of Appeals for the Ninth Circuit (Tr., pp. 69-83), which said court affirmed said decree (Tr., p. 980), the opinion of the Circuit Court of Appeals being found in the transcript on pages 899 to 907.

Thereafter a petition for rehearing was filed by the appellant (Tr., pp. 907-917), which said petition for rehearing was denied by said court. (Tr., p. 917.)

Thereafter such proceedings were duly and regularly had that a petition for allowance of appeal to the Supreme Court of the United States was filed, together with assignment of errors (Tr., pp. 921-930), and an

order allowing said appeal was duly and regularly entered. (Tr., p. 930.) The bond provided for in said order allowing appeal was duly filed (Tr., p. 931), and citation was duly issued. (Tr., p. 932.)

E.

(On the trial the appellees contended that within said Elm Orlu claim there is a vein known as the Rainbow, which at its top or apex crosses the west end line of said Elm Orlu claim and thence on its course continues easterly through said claim, one of the forks of said vein, known as the Pyle strand, crossing the east end line of said claim at a point south of the south side line of the Black Rock claim, and the other fork crossing the south boundary of said Black Rock claim at a point about 300 feet east of the southwest corner of said Black Rock claim, and thence continues to and across the northerly boundary line of said Black Rock claim; that the downward course of said vein is northerly and on its course downward between the end line planes of said Elm Orlu extended northerly in their own direction said vein passes underneath the surface of the Black Rock, Admiral Dewey, Jersey Blue and Silver claims; that the northerly fork of said vein, to-wit, the one passing across the south side line of the Black claim is faulted by a vein which appellees designate as the Jersey Blue vein, and that said Jersey Blue vein passes through said Rainbow lode; that the southerly fork of said Rainbow vein, to-wit, the one which appellees claim crosses the east end line of said Elm Orlu claim unites upon dip with that part

of the northerly fork, the apex of which is within the Black Rock claim, and that by reason of such union the appellees are entitled to all of said vein below the point of said union.

The appellant contended that in the Black Rock claim there is a vein or lode referred to by appellees' witnesses as the Jersey Blue vein, which at its top crosses the westerly end line of said Black Rock claim and continues thence easterly to and across the easterly end line of said claim; that this is the discovery vein of the Black Rock claim; that it nowhere faults the Rainbow, but at surface on strike and at depth on its downward course unites with said Rainbow lode, and that below the plane of union in depth the said appellant, by reason of priority of right, is the owner of the whole of said vein thus united. The appellant, as appears in its answer, also denied that there is a fork of the Rainbow lode, the apex of which is within the Elm Orlu claim, extending east of the point designated as the point of crossing of the Rainbow lode into the Black Rock claim, being commonly known as the 301-foot point. because that is its distance east of the southwest corner of the Black Rock claim measured from its south wall.)

The appellant upon this appeal makes these three contentions:

1. That the Black Rock claim should be decreed to be prior or senior in right.

2. That the trial court should have entered a final decree in defendant's favor quieting title to the Rainbow lode east of the 301-foot plane, without reservation.

3. That the plaintiff, Clark-Montana Realty Company, by virtue of the deed of October 19th, 1906, conveyed to defendant's predecessors in interest all of its right, title and interest (a one-fourth) in *all* of the metals, *ores*, gold and silver and metal bearing *quartz, rock* and *earth* in the Black Rock claim.

It will not be necessary to review or discuss the evidence introduced by the parties, respectively, in support of their conflicting contentions as to a union, crossing or intersection of the Jersey Blue and Rainbow veins, in so far as it applies to any portion of said veins lying westerly of the 301-foot point. As to these matters the evidence was conflicting and we accept the statement of the trial court that it was "in equipoise."

SPECIFICATION OF ERRORS.

The appellant makes the following specification of the particulars wherein the decree appealed from is claimed to be erroneous.

I.

The said Circuit Court of Appeals erred in not reversing the decision and decree of the United States District Court for the District of Montana in this cause.

II.

The said Circuit Court of Appeals erred in holding and deciding that the attempted location of the Elm Orlu mining claim was valid notwithstanding the failure of the pretended locators thereof to file a declaratory statement, such as was at the time of said attempted location

required by the statutes of Montana to be filed in the office of the county recorder.

III.

The said Circuit Court of Appeals erred in holding and deciding that the issuance of letters patent for the said Elm Orlu claim cured any defect in the location of the same and foreclosed any inquiry respecting its validity and that the patent of the Elm Orlu claim took effect by relation as of the date of the attempted location of the claim, to-wit, April 18, 1875.

IV.

The said Circuit Court of Appeals erred in holding and deciding that the statute of Montana of 1907 relating to mining locations cured all defects in the location of the said Elm Orlu mining claim and hence that the patent for said claim took effect by relation as of the date of the attempted location of the claim, to-wit, April 18, 1875.

V.

The said Circuit Court of Appeals erred in affirming the decision of the said District Court wherein it held and decided that the burden of proof was upon the appellant to show that there was a union at depth and not an intersection of the Jersey Blue with the Rainbow lode.

VI.

The said Circuit Court of Appeals erred in holding and deciding that the burden of proof was upon the appellant upon the trial in the said District Court to prove that the alleged apex of the alleged Pyle strand was in the Black Rock claim, or to show where, if at all, the said

Pyle strand at its apex and on its course passed from the Elm Orlu into the Black Rock claim.

VII.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court for the District of Montana to the effect that the Elm Orlu claim had priority over the Black Rock claim.

VIII.

The said Circuit Court of Appeals erred in affirming the decree of said District Court for the District of Montana to the effect that the alleged Pyle strand of the Rainbow lode diverges from the south side of the latter vein in the Elm Orlu claim and there and for some indefinite distance easterly has its apex in the Elm Orlu claim.

IX.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court for the District of Montana to the effect that the so-called Pyle strand or vein had its top or apex, or any part of its top or apex, within the surface boundaries of the Elm Orlu claim extended vertically downward.

X.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court to the effect that the Elm Orlu claim or location was prior in right or in time to either the Black Rock claim or Jersey Blue claim.

XI.

The said Circuit Court of Appeals erred in not holding and deciding that the appellees are not entitled to any

part of the Elm Orlu or Rainbow lode except that portion of the vein lying west of a vertical plane parallel to the west end line of the Elm Orlu drawn through a point on the northerly side line of the Elm Orlu claim 190 feet easterly of the southwest corner of the Black Rock claim.

XII.

The said Circuit Court of Appeals erred in not holding and deciding that the plaintiffs were not entitled to any vein, lode or ledge, or any portion of any vein, lode or ledge, or any portion of any ore bodies within the boundaries of the Black Rock claim extended downward vertically.

XIII.

The said Circuit Court of Appeals erred in not ordering a decree to be entered in said District Court in favor of the defendant-appellant as to all veins and ore bodies in controversy, except as to that portion of the Rainbow lode lying west of a vertical plane parallel to the west end line of the Elm Orlu claim drawn through a point on the south side line of said Black Rock claim 190 feet easterly of the southwest corner of said claim.

XIV.

The said Circuit Court of Appeals erred in not holding and deciding that plaintiffs-appellees did not own any part of the alleged Pyle strand within, or any ore body within the said strand or vein lying within, the vertical boundaries of the said Black Rock claim.

XV.

The said Circuit Court of Appeals erred in not holding and deciding that the defendant-appellant (inde-

statement thereof recorded on the 13th day of the same month.

By the statute of Montana, in force at the time these attempted locations were made, it was provided that:

> "Any person or persons who shall hereafter discover any mining claim upon any vein or lode, containing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, shall within twenty days thereafter make and file for record in the office of the Recorder of the County in which said discovery is made, a declaratory statement in writing, on oath, before some person authorized by law to administer oaths, describing such location in the manner provided by the laws of the United States."
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> (Laws 1873, Extra Session, p. 83.)

The Supreme Court of Montana has repeatedly held that this legislation is valid, mandatory, and that a substantial compliance therewith is indispensable to the validity of the location of a mining claim. Among other cases, we cite the following:

McBurney vs. *Berry*, 5 Mont. 300;

O'Donnell vs. *Glenn*, 8 Mont. 248;

McGowan vs. *McLay*, 16 Mont. 234;

Hickey vs. *Anaconda Copper Mining Co.*, 33 Mont. 46.

The validity of similar or analogous legislation of that state has also been recognized by the Supreme Court of Montana in the case of *Baker* vs. *Butte City Water Co.*, 28 Mont. 222.

Butte Northern Copper Co. vs. *Radmilovich*, 39 Mont. 157; *Ferris* vs. *McNally*, 45 Mont. 20.

In *Second Lindley on Mines*, Section 329, it is said:

> "Where state laws or local regulations exist which are not repugnant to the federal statutes, compliance with such supplemental law is requisite to the validity of a location."

And in *First Lindley*, Section 249, pages 544-5, the author makes the following statement respecting this subject:

> "* * * The right to supplemental federal legislation conceded to the state, may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not by its legislation dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits, the state may legislate. Beyond them the state should not be permitted to go. *And when the state has enacted such legislation, its provisions must be complied with before any valid right to a mining claim can be perfected.*"
>
> (Italics ours.)

Statutory provisions analogous to those above quoted from the laws of 1873 were involved in the case of *Baker* vs. *Butte City Water Co.*, supra. That case was carried to this court on writ of error and will be found in 196 U. S. 119, wherein it was held that the legislation was valid, that it was mandatory, and a substantial compliance therewith essential to the validity of a mining location. At pages 127-8, the court said:

"The Montana Statute (Montana Codes Annotated, Sec. 3612), among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain 'the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims,' and 'the location and description of each corner, with the markings thereon.' A failure to comply with these regulations was the ground upon which the Supreme Court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary, are rather suggested by Sec. 2324. It may well be that the state legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and the corner posts should be at the very beginning placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when by subsequent explorations mining claims of great value have been uncovered."

See also *Belk* vs. *Meagher*, 3 Montana 65; same case, 104 U. S. 279;

Garfield Mining Co. vs. *Hammer*, 6 Montana 53.

In *Belk* vs. *Meagher*, this court, at page 284, said:

"A location is not made by taking possession alone, but by working on the ground, *recording and doing whatever else is required for that purpose* by the Acts of Congress and the local laws and regulations." (Italics ours.)

In *Clason* vs. *Matko,* 223 U. S. 646, the controlling matter before the court was the effect of the failure to comply with a statute of Arizona which required, in the case of re-location of an abandoned or forfeited claim, that the location notice should state that fact. A location notice failing to do so was held invalid and the location void both by the Arizona court and by the United States Supreme Court.

We submit that the question of whether or not a substantial compliance with the requirements of the Montana statute is essential to the validity of a mining location is conclusively settled affirmatively, by the long line of decisions of the Supreme Court of Montana above cited and by the Supreme Court of the United States.

These decisions upon the necessity of compliance with a local statute relating to recording and the contents of the notice were in existence when the Black Rock claim was purchased by the predecessors in interest of the defendant. They had a right to rely upon them, and, relying upon them, they had a right to believe when they bought the Black Rock claim and paid the plaintiffs' grantor on the basis of $1,000,000.00 for it, that they were acquiring a claim that had priority over the Elm Orlu.

These decisions have established in Montana a rule of property which ought not to be disturbed.

We may add that the interpretation of a local statute, even if it refers to mining locations, is really a matter for the state or territorial court. It is of course a well established rule that a decision of a state court inter-

preting a local statute will be accepted by the Federal Courts.

In *Clason* vs. *Matko*, supra, the Supreme Court of the United States, referring to the mining statute of Arizona above referred to and to an alleged ambiguity in that statute, said:

> "Even if we should consider that the statute is ambiguous, we should certainly lean to agreement with the Supreme Court of the territory."

And cites five or its own decisions supporting that statement.

Now, the alleged declaratory statement of the Elm Orlu location is as follows: (Tr., pp. 10-11.)

"ELM ORLU

"Summit Valley Mining District,

"Deer Lodge County, M. T.

"Notice is hereby given that M. McNamee, Chas. E. Savage and I. C. Burkett, have this 18th day of April, A. D. 1875, located the Elm Orlu Lode bearing gold, silver and other metals, under the provisions of the act of Congress of May 10, 1872, situated in the mining district aforesaid and described as follows, to-wit: Beginning at the east line of the Poe lode, thence running along the lode easterly fifteen hundred feet together with three hundred feet of surface ground on each side of the center of the vein and marked at each corner by stone mounds. The discovery post is three hundred feet easterly from the beginning. The claimants adjoining are F. W. Barnard & Co. on the west and Anson Ford on the east.

"C. E. SAVAGE.

"County of Deer Lodge, } ss.
"Territory of Montana }

"On the 19th day of April, A. D. 1875, personally appeared before me the undersigned, a Justice of the Peace in and for said County, Charles E. Savage, and made oath that he and M. McNamee and I. C. Burkett are of lawful age, citizens of the United States, and that the above notice is substantially a copy of the original notice of location of the claim above described as posted thereon.

"Anson Ford, J. P.

"Filed for record April 22d, A. D. 1875, at 8¼ o'clock p. m.

"H. S. Clark,
"County Recorder."

This declaratory statement falls far short of even a substantial compliance with the requirements of the statute. The only facts therein stated upon oath are that the locators are of lawful age, citizens of the United States, and that the notice preceding the verification "is substantially a copy of the original notice of location of the claim above described, as posted thereon." It is defective in precisely the same particulars that the "Nipper" declaratory statement, which was before the court in the case of *Hickey* vs. *Anaconda Copper Mining Company*, supra, was defective, and which was there held to be void.

But it was contended by appellees that patent having issued for the Elm Orlu claim on the first day of January, 1884, the title thereby conveyed is to be given effect by relation as of the date of the attempted location of the Elm Orlu, hence the Elm Orlu is prior in time and right to the Black Rock.

By the issuance of the patent to the Elm Orlu, we admit that it was thereby conclusively adjudicated or determined that at the time of final entry the applicants were entitled to a patent to that claim. But to authorize the courts to give effect to a mining patent as of a date anterior to the final entry, it must be made to appear that prior to that date there was *a valid location* upon which the patent issued.

In *Last Chance Mining Co.* vs. *Tyler Mining Co.*, 61 Fed. 557, the court, at pages 565-6, says:

> "* * * When a patent is issued for a mining claim, it relates back to the time *when a valid location was first made*, if it has been regularly kept up, and the date of such location, if the question of priority is raised, must, in the very nature of things, be determined by proof independent of the patent, unless the patent itself fixes the date. It does not depend upon the question as to which party made the first application for a patent, or which obtained a patent first. It is true that the patent is conclusive of the fact that, at the time the application therefor was made, the applicant had a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question, it is necessary to introduce evidence independent of the patent. And, in such cases, as is said in *Shepley* vs. *Cowan*, 91 U. S. 338, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. The law provides when and how adverse claims to an application for a patent may be made; but such controversies are usually confined to conflicting claims as to the surface ground. When there is no conflict on the surface, there is ordinarily

no necessity of a protest being made. Where the law does not require a protest to be made and an adverse suit to be brought to determine the right of possession before the patent issues, and a patent is regularly issued and thereafter a controversy arises as to the time when the patent takes effect, and it is claimed that it relates back to the date of the location of the claim, that date, if material to the issues raised, must be established by evidence, in the same manner as any other question of fact not settled by the patent itself. * * *

"* * * In *Champion Min. Co.* vs. *Consolidated etc. Mining Co.*, 75 Cal. 78, 16 Pac. 513, the district court, in the trial of the case, proceeded upon the theory that the issuance of the patent was conclusive as to the date of the location of a mining claim as it appeared in the papers and proceedings filed in the United States land office upon which the patent was based. Upon appeal, the Supreme Court expressed its opinion in regard to this question, although it was not necessary to the determination of the case. The principles announced are, in our opinion, correct, and are applicable to the facts of this case. The court said:

"'Where an application for a patent to mining land has been filed in the United States land office, and notice thereof given as required by statute, and no adverse claim has been filed, and the proceedings have regularly culminated in a patent, it may be said generally that the proceedings are conclusive against a third person as to those things with respect to which he might have filed an adverse claim. But, with respect to the united ledge which was afterwards discovered to be a union of the Wyoming and the Phillip, there was nothing in the application for a patent to the Wyoming claim which called for any contest by the owners of the Phillip. The application of the Wyoming claim, if granted, would result in a patent for only the surface ground claimed, and

the ledges whose apexes were within it. If it should turn out that a ledge within that ground united with another ledge, the property of an adjoining owner, the ownership of the united ledge would have to be determined upon the principle of priority of location. * * * The owners of the Phillip ledge, therefore, with respect to the present claim to the united ledge, would and could not have had any standing in the land department as adverse claimants to the Wyoming application. It is therefore somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how ex parte proof, offered in the Wyoming application for the satisfaction of the United States Government, is admissible in the case at bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding.'

* * * *

"It necessarily follows from this reasoning that it devolved upon the Last Chance to show the time when *a valid location* of the Last Chance was made, in order to connect its title by patent with the date when the location of its claim was made." (Italics ours.)

It will be borne in mind that in the case at bar, the owners of the Black Rock claim had obtained a patent thereto before any application for patent to the Elm Orlu was made and that the Elm Orlu claim, as patented, conflicted not at all with the Black Rock. Therefore, we were not called upon to and could not have filed any adverse claim to the Elm Orlu application.

In the case of *Hickey* vs. *Anaconda Copper Mining Company*, supra, the declaratory statement of the Nipper

location was defective precisely as is the declaratory statement of the Elm Orlu defective; but it had gone to patent, and it was attempted by the owners of that claim to give effect to the patent as of the date of this defective declaratory statement. But the Supreme Court of Montana said: (33 Mont. 46.)

> "* * * plaintiffs thought it necessary to introduce in evidence the declaratory statement of the Nipper claim, and the only possible theory upon which they could have offered it, as it appears to this court, was to avail themselves of the doctrine of relation, and thereby show that, notwithstanding the patent for the Nipper claim was issued subsequent to that for the Oden, still, as a matter of law, the Nipper was the older claim, and therefore entitled to all minerals at the point of union or intersection of the Nipper vein with the Blue X fissure, although that intersection occurred in the Oden territory.
>
> "Upon the offer of this statement in evidence, the defendants objected upon the ground that the same was void, for the reason that it was not verified as required by the laws of the territory of Montana in force at the date of filing of such statement. This objection was overruled, and exception saved. The verification to the Nipper declaratory statement is as follows: 'John M. Stewart and R. L. Liles, who being first duly sworn on oath says each for himself that he is of lawful age, a citizen of the United States, and that the foregoing notice by them subscribed is a true copy of the original notice of location of the claim above described as posted thereon, on the day therein stated.' The statute in force when this statement was presented for record provided: 'Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, shall, within twenty days thereafter, make

and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States.' * * *

"Assuming, then, as we may rightly do, that the statute was constitutional, the invalidity of the Nipper declaratory statement becomes apparent. This question has been determined so often by this court that it cannot now be deemed open for further controversy. (Citing a number of cases.)

"Of the doctrine of relation it has been said by courts and text-writers that the proceedings in the Land Department leading up to and including the issuance of patent amount to an adjudication that all requirements of the law have been met, and the patent, when issued, relates back to the date of location. What is meant by 'date of location' is not so easily determined. In this state, at least, 'the law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists.' (Citing cases): *Lindley on Mines*, Sec. 329. 'A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations.' * * *

"The acts which, taken together, amount to a location, begin with the discovery and terminate with the filing for record of the declaratory statement; and, as the location is not complete until such declaratory statement is filed, the date of its filing must of necessity be the date to which the patent relates. If, then, in this instance, the Nipper declaratory statement was invalid, one of the essentials of a legal location was wanting, and a location, within the

meaning of our law, was not effected, and there was not any date to which the Nipper patent could relate —at least, no date antecedent to the application for patent, which was the first intimation the government had that an attempt had been made to locate this claim.

"But it is contended that the issuing of the patent was itself conclusive that the declaratory statement, notwithstanding its patent invalidity, was in fact valid, and authorities may be found to uphold this contention. Indeed, there are expressions in our own early decisions apparently sustaining this view. In *Lindley on Mines*, Sec. 742, the doctrine is announced that in case of mining patents the issuance of the patent is in effect an adjudication of all questions respecting matters which might have been the subject of an adverse claim, or, in other words, where there is any surface conflict whatever, and there is a failure to adverse, after patent has issued to the applicant the question of priority of his title is conclusively presumed. (Citing cases.) But as we have heretofore said, the only instance, after patent, where the question of the date of location may arise, is when seeking to apply the doctrine of relation in connection with the particular patent, for the purpose of determining the ownership of minerals at the point of union, or intersection of veins, as provided by Section 2336 of the United States Revised Statutes. * * * It is to be observed that under this section the ownership is to be determined by the priority of title. But the intersection of veins does not give rise to an adverse claim, within the meaning of that term as employed in the public land laws. * * * Indeed, it frequently occurs that such intersection or union is not discovered until long after patent has issued, and in any event an adverse claim only arises from surface conflicts.

"The reason for adopting the rule of relation is apparent. For, when the location is made in con-

formity with the provisions of the federal statutes, and in compliance with the state laws and local mining rules and regulations, it has the effect of withdrawing from the public domain the particular claims, and gives to the locator the right to the exclusive possession so long as he complies with the law. 'The location, to be effectual, must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession.' *Belk* vs. *Meagher, supra.* And when the right thus initiated is further evidenced by patent, it is reasonable to relate the patent to the initiation, and protect the patentee against intervening rights. But if the locator did not proceed according to law, he did not initiate any right to which the patent could relate. Of course, the government, being the owner of the claim, may issue patent therefor upon such showing as Congress may see fit to exact. But Congress has not attempted to make such patent, when issued, retroactive in its effect, or relate back to any prior point of time, if, indeed, it might do so. The doctrine of relation is a fiction of law, and whether a patent relates to the date of location is to be determined by the facts of each particular case. It may be conceded that the patent is conclusive that everything has been done which the federal statutes require shall be done as condition precedent to patent, but we cannot believe that it is conclusive of matters with respect to which the government issuing the patent has not any concern. * * *

"We are satisfied that the patent is not conclusive of the fact that a declaratory statement in due form of law was filed for record. In our judgment, when a patentee seeks to show that his title is older than the evidence of his title indicates—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location, he must show

affirmatively a location valid under the laws of the state where the claim is situated."

Take the following supposititious case:

In 1882 Smith, claiming to be entitled to the A mining claim, desires to obtain a United States patent thereto; he procures from the Surveyor General an order of survey of the claim, as required by the Act of Congress; the survey is duly made, returned and approved; whereupon he makes application for patent, posts notice thereof on the ground, and the requisite publication of the application is duly given. Within sixty days after the first publication, no adverse claim having been filed, proof is made of the requisite posting, payment made, final entry allowed, and thereafter in the same year he obtains the patent. From the date of this patent Smith's title to the A claim is indefeasible. (This, we take it, will not be disputed.)

Thereafter, and in the year 1884, Brown, claiming to be entitled to the B claim, which adjoins the A claim but does not conflict therewith, makes application for and procures a patent to said B claim. By the latter patent it is also conclusively determined that from and after its issuance or from and after the date of final entry, Brown's title to the B claim is invulnerable to attack by anyone.

Thereafter, developments disclose that a vein in the A claim, in its downward course, unites with a vein in the B claim. Whether Smith or Brown is the owner of the entire vein below the place of union depends upon the question of priority of right and title.

Now, in such case, may Brown be permitted to show or to contend that notwithstanding his patent to the B claim is junior to Smith's patent to the A claim, yet he is entitled to priority because his patent was issued or based upon an attempted, *though invalid*, location, which antedated Smith's patent? There having been no surface conflict between the B claim for which Brown applied for patent and Smith's A claim which theretofore had gone to patent, Smith was not only not required to, but could not, file an adverse claim to Brown's application. If the Land Department had *in terms* erroneously determined that Brown's void location was valid, that determination having been made in proceedings to which the Government, on the one hand, and Brown, on the other, were the only parties—proceedings to which Smith was a stranger and in which he could not intervene—upon what principle can Smith be held to be bound or concluded by such erroneous judgment or determination? Surely it will not do to say that one can be bound by a judgment rendered in an action or proceeding to which he was not a party and in which he could not be heard.

Appellees, in support of their contention that the issuance of the patent to the Elm Orlu claim was a conclusive determination of the validity of the declaratory statement filed by the alleged locators of the claim, rely upon language found in the concluding paragraph of the opinion of this court in the case of *Calhoun Gold Mining Co.* vs. *Ajax Gold Mining Co.*, 182 U. S. 499 (on writ of

error to the Supreme Court of Colorado), which is as follows:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented claims of the defendant in error, to-wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery *and related back to the date of the locations of the claims.*" (Italics ours.)

The question whether or not the patent related back to the date of the locations, was not involved in the Calhoun case. It may be admitted that it would so relate if it were issued upon a valid location,—not, however, if it were based upon a void location,—certainly not as against one who was a stranger to the patent proceedings and whose rights would be prejudicially affected thereby.

In the later case of *Uinta Tunnel M. & T. Co.* vs. *Creede & C. C. M. & M. Co.*, 119 Fed. 164, the question was: Whether the defendant, claiming under a valid tunnel location made prior to the final entry and issuance of patent to plaintiff of the Ocean Wave and Little Mary claims, could be permitted to show that at the time of defendant's tunnel locations, no discovery of a vein or lode had been made in the Ocean Wave or Little Mary? At page 166, Sanborn, Judge, speaking for the Circuit Court of Appeals, says:

> "When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site open to de-

termination by means of evidence or testimony dehors the patents? This is the principal question presented by this record. If the query were whether or not it is competent to show by proof outside of receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question for the reason that this is an issue between the parties to a proceeding before the land department which that tribunal necessarily considers and decides when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack. * * * This was the question which the supreme court answered in *Calhoun Gold Min. Co.* vs. *Ajax Gold Min. Co.*, 182 U. S. 499; and while, if the language of the opinion in that case is careslessly read without knowledge of or reference to the question actually before the court, it may seem to be broader, a careful examination of the facts which the record there discloses demonstrates the proposition that the decision went no further. In that case the receiver's receipts on the lode claims of the appellee had been issued before the claim to the tunnel site was located. * * * In a proceeding between the lode claimants and the United States the Land Department had decided that mineral in place had been discovered within the claims and had permitted their entry. Subsequent to this decision and to these entries the owner of the claim to the tunnel site located it across the lode claims, and upon the trial offered to prove that there had been no discovery of mineral in place within those claims before they were entered. The trial court rejected the offer. The Supreme Court said: 'The ruling was right. The patents were proof of the discovery, and related back to the date of the locations of the claims. The patents could not be collaterally attacked.' Thus, it may be seen that

the only proposition there decided was that one who had initiated no claim upon lands when they were entered by other claimants could not subsequently collaterally attack the decision of the land department that there had been a discovery of mineral in place upon the claims at some time before they were entered.

"Counsel for the plaintiff rely upon the decision and opinion in this case, and insist that it fairly sustains the rulings of the court below. But there are radical and controlling differences between the question presented in that case and the issue of law before us in the case in hand.

"1. A judgment is binding upon the parties to the proceedings in which it is rendered and upon their privies. The parties to the judgments of the land department by which it allowed the entries of the lode claims in the case of the Gold Mining Company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims upon or interests in the lands under either of the parties to the proceeding subsequent to the judgment of the land department. The claimant of the tunnel site in that case initiated its claim under the United States, one of the parties to that proceeding, subsequent to the judgments. It was therefore a privy of the United States and was estopped by the judgments of the land department from proving that no discoveries had been made upon the lode claims before these judgments were rendered. This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the land department allowing the entries were rendered on August 5, 1892. At that time there were three parties interested in the land,—the lode claim-

ants, the United States, and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States, were parties to the proceedings, and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments, or to the patents, and, upon familiar principles, was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon and interest in the land.

"Not only was the claimant of the tunnel site not a party to the proceedings in the land department which resulted in the entries and patents to the lode claims, but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time because its rights therein were then too uncertain, contingent, and intangible for determination. * * *

"2. The issue whether the discoveries in the lode claims were made before the location of the tunnel site in the Ajax Gold Min. Co. case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims. The finding that such discoveries had been made before the date of the entries was indispensable to the decision that the lode claimants were entitled to make the entries so that that finding must have been made by the department. But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgments.

"It is not so in the case before us. The question here is whether or not discoveries were made in the lode claims prior to January 13, 1892, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensable nor material to the adjudication made by the land department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by that department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to August 5, 1892, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case whether they were made before or after the location of the tunnel site on January 13, 1892."

That case went to the Supreme Court of the United States on writ of certiorari and is reported in 196 U. S., p. 337. At pages 353-4, it is said:

"In the *Ajax* case the contest was between mining claims on the one hand and a mining claim and tunnel site on the other. All the mining claims had passed to patent. The plaintiff in error, who was defendant below, held the junior patent issued upon a later entry, and the entries of plaintiff's claims were made and the receiver's final receipt issued prior to the location of the tunnel site. In other words, the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to invalidate them by proof that there had been no previous discovery of mineral. This was refused by the trial court, and we sustained the ruling, saying:

"'The patents were proof of the discovery and related back to the date of the locations of the claims.

The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.'

"An entry sustained by a patent, is conclusive evidence that at the time of the entry there had been a valid location and such valid location implies as one of its conditions a discovery, and the decision only went to the extent that this could not be challenged by one who at the time of the entry had made no location and therefore had acquired no tunnel right. There is nothing in this ruling to conflict with the views we have expressed.

"It would seem, therefore, from this review of the authorities as well as from the foregoing consideration that, as between the Government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if at the time of the entry everything has been done which entitled the party to an entry, to-wit, a discovery and a perfect location, the Government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. * * *

"* * * One not a party to proceedings between the Government and the patentee is concluded by the action of the Government only so far as that action involves a determination. There is a determination by the fact of entry and patent that there was prior to the entry a discovery and location. Having been so determined third parties may be concluded thereby.

"But it may be said that when the time of a particular fact is concluded by an adjudication or when an opportunity is presented for such an adjudication and not availed of the time as stated must be considered as settled; that when the plaintiff applied for its patent if there was any question to be made by the defendant of any statement of fact made in

the location certificate, or other record, it should have been challenged by an adverse suit. Failing to do so the fact must be considered to be settled as stated. Undoubtedly, if in an adverse suit the time of any particular matter is litigated, the judgment is conclusive, and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant and determined in favor of the plaintiff, there could be now no injury. So, when the owner of a lode claim makes application for a patent and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit, and if he fails to do so that question will be as to him concluded. Such is the purpose and effect of the adverse proceedings."

The court having there determined that the tunnel claimant was not required to file an adverse claim to claimant's application for his lode patents, held that the question of priority was not determined by such patents.

In the trial court counsel for appellees also relied upon the case of *Lawson* vs. *United States Mining Co.*, 207 U. S. 1, and the case of *El Paso Brick Co.* vs. *McKnight*, 233 U. S., p. 250.

In the *Lawson* case, speaking of the location notices of the Old Jordan and Mountain Gem mining claims, the court, at page 19, says:

"* * * Inasmuch as they were accepted by the government, and patents issued thereon, it was a recognition by the department of the conformity of the proceedings to the local rules and customs of

the district, and such ruling is not opened to challenge by third parties claiming rights arising subsequently to such notices."

At page 18 (of the opinion) will be found a copy of the notice of location of the Old Jordan, and the court states that the Mountain Gem location notice was similar in form. A reading of this notice of location of the Old Jordan will disclose that there is nothing on the face of it to suggest its invalidity or insufficiency in any respect. Both claims were located prior to the passage of the act of July 26, 1866; the Old Jordan, on September 17, 1863, and the Mountain Gem on August 20, 1864. It was not contended or even suggested by counsel for Lawson in that case that there was anything disclosed on the face of the record to justify the inference, even, that the locations of these claims were invalid. It was stipulated between the parties in the trial court in that case that the patents for those claims, respectively, were based upon said respective notices of location. The contention of counsel for petitioner there was that these patents were issued prior to the passage of the act of July 26, 1866, and that it did not appear that the locations were in conformity with the miners' rules and regulations of the district in which the claims were situated. But these rules and regulations were not introduced in evidence by either party. Of course the courts could not take judicial notice of them. There was nothing, therefore, before the court in that case from which an inference could be drawn that these locations did not strictly conform to such rules.

In the case of *El Paso Brick Co.* vs. *McKnight*, it is true that in the opinion, delivered by Mr. Justice Lamar, the following is found:

> "* * * The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem*, and determined that the brick company's original locations were valid and that everything necessary to keep them in force * * * had been done."

But an examination not only of the opinion of the court but of the briefs on either side (which will be found in the report of the case in 58 L. Ed.) will disclose that there was no question there made by either party respecting the sufficiency of the notice of location. For aught that the record shows its sufficiency was conceded. And the statement that the final entry determined the validity of the original location, therefore, was *obiter dictum*. The foundation of the decision in that case, which was adverse to McKnight, was that it was no longer open to him to contest the right of the Brick Company to a patent because of his failure to file any adverse claim to the Company's original application therefor. That this was the sole ultimate question calling for determination will be made apparent by an examination of the court's opinion, from which it appears that the first application for patent was filed in August, 1905, together with an affidavit (executed before an officer residing outside of the mining district) that notice of the application had been posted on the land, that these papers were filed with the Register, who gave the further notice re-

quired by statute. No protest or adverse claim was filed by any person. On the 23d day of October, 1905, the land officers allowed an entry on which the Receiver issued a final receipt. On September 4, 1906, the Commissioner of the General Land Office ruled that the entry was fatally defective because the original affidavit as to posting had not been executed before an officer residing in the land district. From that ruling the Brick Company appealed, and on a hearing before the Assistant Secretary of the Interior it was by him decided that the fact that the affidavit of posting had been signed before an officer residing outside of the district, was a fatal defect which invalidated the entire proceeding. The Brick Company, on the 24th day of November, 1908, waived its right for a petition for a review of that decision, and on the next day filed at the local land office a second application for patent, to which application McKnight filed his adverse claim, and the action was brought in support thereof. The court, in its opinion, held that the final entry made under the first application for patent was an adjudication that no adverse claim existed and that the Brick Company was entitled to a patent, and says:

> "From that date, and until the entry was lawfully canceled, the Brick Company was in possession under an equitable title, and to be treated as 'though the patent had been delivered to' it. (Citing cases.) And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner.

"Nor should the result have been different when the record showed that the entry and final receipt, properly issued, had been improperly canceled. It is true that the order of the Department was a denial of the patent, but it was not a conclusive adjudication that the Brick Company was not entitled to a patent, nor could such an order deprive the Brick Company of rights vested in it by law. For while the General Land Office had power of supervision over the acts of local officers, and could annul entries obtained by fraud or made without authority of law, yet, if the department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for."

The court having held that the decision of the Commissioner of the Land Office was erroneous, further says:

"* * * The fact that the Brick Company, per force, yielded to the erroneous ruling, and instituted new proceedings in order to secure a patent, as evidence of its title, did not destroy the rights with which the company had become invested by full compliance with the requirements of Revised Statutes, Sec. 2325."

Now, the rule is fundamental that any language found or expression used in a decision of any court is to be read, understood and applied in the light of the facts of the particular case with which the court was dealing. As said by Chief Justice Marshall, in the celebrated case of *Cohen* vs. *Virginia,* 6 Wheat., at p. 399:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in

connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control a judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Hans vs. *Louisiana*, 134 U. S., pp. 1, 20;
Leisy vs. *Harden*, 135 U. S. 100, pp. 134-5.

In concluding the present discussion on the question of priority, we again direct attention to the fact that the validity of Montana legislation strictly analogous to the Act of 1873, above quoted, was upheld by this court in *Butte City Water Co.* vs. *Baker, supra*,—wherein it was decided that such legislation was not in conflict with, but was clearly authorized by, the Congressional Act of 1872. The validity of this legislation having been thus conclusively determined, it follows, we take it, that a substantial compliance with the provisions thereof was indispensable to the validity of a mining location in that state, as much so, as would compliance with a like provision, if found in the Act of Congress itself, be indispensable. At the date, then, of the issuance of patent to the Black Rock, there had been no valid location of the Elm Orlu claim. The attempted location thereof was at that date void. And so, as we have seen, the Supreme Court of Montana has uniformly held. Had a similar suit to the present one been brought the week after the issuance of

this patent to the Black Rock, there can be no doubt that it would necessarily have been therein adjudged that the owners of that claim were, by the patent, clothed with a vested and unimpeachable title thereto, antedating any valid claim of title which the claimants of the Elm Orlu could then assert, and hence, that the Black Rock was prior in right and time to the Elm Orlu. Clearly such priority could not be lost nor in any manner affected by the subsequent issuance of patent to the Elm Orlu claim.

II.

RETROACTIVE EFFECT OF STATUTE.

Subsequent to the decision in the Hickey case, supra, the legislature of Montana passed the following statute:

Revised Codes of Montana, 1907; Section 2292:

> "Validating locations heretofore made.—All mining locations, made and recorded under the laws of this state, heretofore in force, that in any respect have failed to conform to the requirements of such laws, shall, nevertheless, in the absence of the rights of third persons accruing prior to the passage of this Act, be valid if the making and recording of such locations conform to the requirements of this Act. (Act approved February 18, 1907, Sec. 10.) (10th Sess., Chap. 16.)"

Revised Codes of Montana, 1907, Section 2294:

> "The issuance of a United States patent for a mining claim shall be deemed conclusive that the requirements of the laws of this state, relative to location and record of such mining claim, have been duly complied with; provided, however, that where ques-

tions of priority are involved, the date of the location shall be an issuable fact where it is claimed to have been prior to the date of the record of the location."

(Act approved February 18, 1907, Sec. 12.) (10th Sess., Chap. 16.)

(Section 6213 of the Revised Codes of Montana, 1907, being Section 4651 of the Codes of 1895, so far as material, provides:

"6213.—No part of it (meaning the Codes) is retroactive, unless expressly so declared.")

The Circuit Court of Appeals in this case held that the defect in the Elm Orlu location was cured by said Sections 2292 and 2294, relying in part upon the fact that the caption of Section 2292 reads as follows: "Validating Locations Heretofore Made." In discussing this question the Circuit Court of Appeals said:

"The codes, after they were framed, were enacted, however, as the law of Montana, and even assuming that it was not the intention to make the caption to the section a part of the law, we think the language of the act itself is sufficient to express the intention of the legislature to make it retroactive."

The act of 1907, even if retroactive, does not cure the Elm Orlu. Said Section 2292, by its express terms, requires, as a condition of validation, that the defective locations conform to the requirements of the Act of 1907. It says:

"All mining locations, * * * shall, * * * be valid, *if the making and recording of such locations conform to the requirements of this Act.*" (Italics ours.)

The Elm Orlu does not conform.

Section 2284 of the same code (Section 2 of the same act of 1907) requires the recording of a certificate of location, and provides, *inter alia:*

> "*Such certificate of location must be verified,* before some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by an authorized agent." (Italics ours.)

So, without a sufficient verification, there can be no validation.

Further: The correct interpretation of Section 2294 should restrict its operation to claims not patented. Said section refers to "locations." The words "location" and "claim" are often used interchangeably, but "location" has also another meaning, expressed by Mr. Justice Field, as follows:

> "A location is the act of appropriating such parcel [of mining ground] according to certain established rules."
>
> *St. Louis S. & R. Co.* vs. *Kemp,* 104 U. S. 636, 649.

Where a validating statute speaks of "locations," it must in logic and reason be understood to mean unpatented claims, especially where another section of the same statute specifically deals with patented claims.

However, the court was in error in stating that the codes, after they were framed, were enacted as the law of Montana. This never occurred. The legislature of 1907 by enactment appointed a codifier, who compiled the legislation subsequent to 1895, and renumbered all

sections of the acts of the codes of 1895 and subsequent legislatures. This compilation was designated by law "The Revised Codes of Montana, 1907," but never was enacted by the legislature of Montana.

See Revised Codes of Montana, 1907, Secs. 3567-3582, and Chapter 85, Session Laws, 1907.

Sections now numbered 2292 and 2294, as enacted, had no head notes or captions.

See Chapter 16, Session Laws 1907, Montana Legislature, Sections 10-12.

The existence or non-existence of head lines is not, however, a matter of importance. It is the wording of the sections themselves which must indicate what the purpose of the legislature was.

Section 2292, viz., the validating section, expresses its own limitation. It only purports to validate locations theretofore made "in the absence of the rights of third persons accruing prior to the passage of this act." It was not the intention of the legislature to in any manner disturb rights of third parties vested before the passage of this act.

In *Consolidated Gold & Sapphire M. Co.* vs. *Struthers*, 41 Mont. 565, cited by the Circuit Court of Appeals, the court stated that only one of the parties was claiming under a mining location, or under the United States, and defendant presented no evidence of title or right in himself. Therefore, the application of the statute of 1907 did not contradict the rule contended for by us.

But even with an express declaration that these pro-

visions should be retroactive, the legislature could not have impaired the vested rights of the appellant.

In the District Court and in the Circuit Court of Appeals, appellees cited in their briefs *Mutual Life Ins. Co.* vs. *Winne*, 20 Mont. 20; *McFadden* vs. *Evans*, 185 U. S. 505; *Downs* vs. *Blount*, 170 Fed. 15; *Cooley Constitutional Limitations*, 7th Ed., pp. 528-531. An examination of these authorities will disclose that they recognize the uniform rule that where vested property rights exist such rights cannot be destroyed or impaired by subsequent legislation. In each and all of them the question (what was then) an invalid location, the courts must have held that the rights of these patentees were prior to any right in the Elm Orlu claimants; and that, by virtue of such priority of right the owners of the Black Rock were entitled to the ore bodies in controversy in this action.

Now, the issuance of the patent to the Black Rock claim on the 15th of February, 1882, vested in the patentees of that claim an indefeasible title thereto, and to all veins or lodes throughout their entire depth, the tops or apices of which were found within the surface boundaries thereof, and if thereafter (and prior to the act of 1907 and prior to the final entry of the Elm Orlu) a controversy, such as is involved in this suit, had arisen between the patentees of the Black Rock and the Elm Orlu claimants, who rested their claim of ownership upon a valid location, the courts must have held that the rights of these patentees were prior to any right in the Elm Orlu claimants; and that, by virtue of such priority of

right the owners of the Black Rock were entitled to the ore bodies in controversy in this action.

Furthermore, the Elm Orlu and Black Rock claims having both been patented prior to 1907, all rights of the respective parties in the premises had thereby become fixed and vested. The determination of the respective rights under the patents was exclusively a judicial question. The legislature had no power to affect or determine these rights.

Inasmuch as the Circuit Court of Appeals assumed that the Supreme Court of Montana in the Struthers case, supra, had considered Sections 2292 and 2294 as applicable to mining locations theretofore made, we quote at length from that decision for the purpose of showing that it does not bear upon the present controversy:

> "Error is alleged upon the action of the Court in overruling the objection of defendants to the admission in evidence of the original and amended declaratory statement of location of the Ruby placer mining claim and the receipt of the receiver of the United States Land Office. To the declaratory statements it was objected that they do not comply in several particulars with the requirements of the statutes of Montana. The defendants are not in a position, however, to take advantage of these defects, if in fact they are such. The original location of the claim was completed January 30, 1892. The amended location was completed on March 26, 1906. Both fully comply with the requirements of the federal statutes. The legislation prescribing the requirements to be observed by the locator of a mining claim at the time the second declaratory statement was recorded, (Pol. Code 1895, Sections 3610-3616,) was amended in several particulars by the act of 1907

(Rev. Codes, Sections 2283-2296). Among other provisions embodied in the latter it is provided: 'That no defect in the posted or recorded certificate shall be deemed material except as against one who has located the same ground, or some portion thereof, in good faith and without notice.' *The defendants did not attempt to show title in themselves by location or any other method provided for by the federal statute.*" (Italics ours.)

The foregoing excerpts, which are the only references to these sections, show that the doctrine of relation was not involved or considered in that case.

In *Boston & Butte Mining Co.* vs. *M. O. P. Co.*, 25 Mont. 67, speaking of a somewhat similar question, the court said:

> "In so far as the part of the amendment under consideration and affecting the present case was intended to apply to estates existing at the time the act of 1899 became operative, it must be held to be an attempt to disturb or destroy vested rights, and therefore to be void."

See also, *Ayotte* vs. *Nadeau*, 32 Mont. 512, 81 Pac. 148.

The gross injustice of a contrary rule is made manifest in this very case, for the Black Rock was purchased from one of the plaintiffs and others in 1906 (see Defendant's Exhibit 120, Exhibit Book, p. *135*), after the decision in the Hickey case. It is well established that a legislature under a Constitution like that of Montana or the United States cannot overrule a Court decision nor modify a rule of property thereby established except as to the future.

In *Cooley's Constitutional Limitations*, at page 529, we find the following:

> "Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that the statute should have a prospective operation only, unless its terms show clearly the legislative intention that it should operate retrospectively."

The sections were only intended to apply prospectively. Whether such was or was not the intention, however, would have little significance, because if vested property rights were interfered with, the sections would violate the provision of the federal constitution prohibiting the taking of property without due process of law. If it be urged that the statutes merely provide a rule of evidence, we say it is elemental that if a statute under the guise of prescribing a rule of evidence seeks to destroy vested property rights it is unconstitutional.

See:

Chew Heong vs. *U. S.*, 112 U. S. 536, 559;

Auffm'ordt vs. *Rasin*, 102 U. S. 620, 622;

Rutherford vs. *Greene*, 2 Wheat. 196;

Murray vs. *Gibson*, 56 U. S. 421;

Spitley vs. *Frost*, 15 Fed. 299;

Humboldt L. M. Ass'n vs. *Christopherson*, 73 Fed. 239;

Schenck vs. *Peay*, Federal Cases No. 12450;

Re Billing, Federal Cases No. 1408;

Richardson vs. *Cook*, 37 Vt. 599, 603;

McGahey vs. *Virginia*, 136 U. S. 662, 693;

Bank of Ukiak vs. *Gibson*, 39 Pac. (Cal.) 1069, 1071.

For further interpretation as to the retroactive effect of such statutes as here considered, see *Wilson* vs. *Pickering*, 28 Mont. 435, 440, 72 Pac. 821; *Bullard* vs. *Smith*, 28 Mont. 387, 403, 72 Pac. 761.

As construed by the Circuit Court of Appeals the sections in question are subject to the further objection that they invade the exclusive province of Congress to declare the effect of United States patents. It was not within the power of the Montana legislature to declare the effect of the appellant's patent or to provide that the appellees' patent should be deemed to convey a prior right.

In *Bagnell* vs. *Broderick*, 13 Peters 436, 10 Law. Ed. 10, the Court said:

> "Congress has the sole power to declare the effect of titles emanating from the United States. * * *"

III.

THE PYLE STRAND.

A further contention on the part of appellees at the trial was that within the Elm Orlu claim there was a fork or branch of the Rainbow lode which diverged from that part which crossed over the northerly side line of the claim and entered the Black Rock, as found by the trial court; that this diverging fork or branch continued at its apex easterly from the point of forking to and across the easterly end line of the Elm Orlu; that this branch in its downward course was traceable continuously from its apex in

the Elm Orlu to a union at or about the 1200 level of the Black Rock claim with the main branch of the Rainbow there found in the Black Rock easterly of the 301-foot plane mentioned in the court's findings and decree; and that the Elm Orlu claim, having priority over the Black Rock, the appellees were entitled to all of the vein in the Black Rock easterly of the 301-foot plane below the plane of such union.

(These contentions and each of them on the part of appellees were controverted by appellant at the trial and, as will presently appear, neither of them is supported by evidence.)

Presumptively, of course, the owners of the Black Rock claim are the owners of all the veins and ore bodies found within the exterior limits of the claim extended downward vertically. As said by Judge Hallett, in the case of *Leadville Mining Company* vs. *Fitzgerald*, 15 Fed. Cases, No. 8158:

> "* * * within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until someone shall show, by a preponderance of testimony, that such deposits belong to another lode, having its top or apex elsewhere."

That this presumption can only be overcome by clear and satisfactory evidence, is well settled. This doctrine

has been so often announced by the courts, state and federal, including this court, that a citation of authority in support of the proposition is unnecessary.

The alleged branch or fork of the vein claimed by appellees to extend at its apex from the point of forking to and across the easterly end line of the claim, is called by the witnesses throughout the "Pyle branch" or "Pyle strand." We admit that this so-called Pyle strand does in its downward course unite with the so-called Rainbow at or about the 1200 level of the Black Rock at or about a point which would be intersected by a vertical plane passed through the easterly end line of the Elm Orlu and extended northerly in its own direction to an intersection with said 1200 level where it is found in its upward course branching from the Rainbow, and that in its upward course this branch has been developed for considerable distances on the 1000, 900 and 800 levels. But appellant denies that the apex or any portion of the apex of this Pyle strand is found anywhere within the Elm Orlu. Where its apex is found is altogether conjectural. For aught that appears from the evidence, it may have its apex in the Black Rock and, indeed, this is probably the case.

The evidence upon this question of the Pyle strand is not voluminous, and we think it not improper to present it here in its entirety in order that the court may readily perceive how inadequate it is to justify or give countenance to the contention of appellees.

Mr. Greene, at page 156, testifies as follows:

"Q. Mr. Greene, is there a raise that breaks into the 500 level near the east end of that level?

"A. A raise was driven from the 450-foot level of the Black Rock shaft up through and above our 500-foot level.

"That raise started on the Pyle strand of the Rainbow lode, which will be shown below. It was carried up to within about two floors, where it was very distinct, but became very badly broken and crushed, and other things coming into the raise made the Pyle strand very indistinct—not easily followed.

"The next map is marked Plaintiff's Exhibit 11, and shows the 400-foot level of the Black Rock. This is a short distance below our 500-foot, the Elm Orlu 500. From the Black Rock shaft the old cross-cut north reaches the Rainbow lode and drifts to the east and southwest were made from that."

"In the workings west of the crosscut east of the shaft, the Rainbow vein was followed in a southwesterly direction to station 281. * * * The crosscut actually reaches the south wall of the vein at that point."

And at page 158:

"To the south near station 548, we identify a strand of the Rainbow lode running a little south of east, and being the Pyle strand, and from that point a raise was driven at our request up to our 500-foot level. A drift was made for us from here 455 feet to the east on this same strand, to where a raise came up from the 700-foot level of the Black Rock. * * * That connection was made on this Pyle strand. That is the same one that I mentioned as being within a couple of floors of the 500."

On cross-examination, at page 181, he testifies:

"Q. What was the most easterly surface work-

ing within the boundaries of the Elm Orlu when you entered upon your employment in December, 1913?

"A. The most easterly was called the east shaft, and the workings from it. * * * The east shaft is located about 250 feet west of the east end line."

(It is not claimed that the Pyle strand is disclosed in this shaft.)

And at page 182, he testifies:

"Q. Well, apart from the east shaft what was the most easterly surface working within the boundaries of the Elm Orlu in December, 1913, regardless of age?

"A. Trench F-1, F-2 and F-3.

"Q. Apart from the east shaft, those trenches were the most easterly surface workings, whether new or old, within the boundaries of the Elm Orlu in December, 1913?

"A. Yes, sir."

He testified the distance from those trenches to the east end line of the Elm Orlu is, roughly, 650 feet.

At page 192, referring to plaintiff's map, Exhibit 8, the witness testifies:

"Q. Having found at station 1058 what you were satisfied in your own mind was the eastern segment of the Jersey Blue vein, what was the purpose of continuing the Clark cross-cut still further to the south?

"A. It was continued still further to the south to pick up the Pyle strand of the Rainbow lode.

"Q. Did you pick it up?

"A. *I don't know.*

"Q. Did you pick it up in that cross-cut or any of the workings connected with that cross-cut?

"A. *I don't know.*

"Q. If it is there you could not recognize or identify it?

"A. If it is there we could not identify it."

And at pages 211 and 212:

"Q. Calling your attention to Exhibit No. 4, the general plan map, that portion of the work in which trench F-2, G, H and L are found, do you regard that as a southeast branch of the Rainbow lode?

"A. Yes.

"Q. Can you show me there on the next level below where you find that same branch, the first level below the surface?

"A. Plaintiff's Exhibit No. 7. * * * No. 1 drift here.

"Q. What are the dimensions of the vein there pictured, the width?

"A. There is a core of quartz with a small selvage on the north side of from 12 to 16 inches in width, accompanied by three or four feet of very highly altered granite.

"Q. Is that on what you have spoken of as the Pyle branch?

"A. *I don't know.*

"Q. Well, have you any opinion about that; do you think it is?

"A. I should not like to express an opinion as to that.

"Q. Do you think that the southeasterly branch shown through trenches E, H, K and L is that Pyle branch?

"A. I would not be inclined to say that they were. * * * I am inclined to say that they are probably not on the same branch.

"Q. Have you taken the dip of this branch showing in No. 1 drift east on Exhibit 7?

"A. Yes. * * * It dips to the south slightly, from end to end of this drift."

And at pages 216-18:

"Q. I call your attention to some work on Exhibit 10 run in a somewhat zigzag course, in which are found, among other figures, numbers 83, 84, 82, 70, 68, 66, 64 and 65. Was that run under your direction?

"A. Yes.

"Q. What were you hunting for?

"A. We were hunting for the extension of the vein in 513 crosscut; * * *

"Q. Was that the vein in 513 crosscut; is that what you call the Pyle strand?

"A. I believe that was the Pyle strand."

Referring to plaintiff's map, Exhibit 10, witness testifies at pages 216-217-218:

"In a somewhat zigzag working * * * from 517 crosscut we had a vein possibly 12 inches in width, that was followed east and was cut off. * * * It was faulted there by a little northwest-southeast slip, and the drift was turned, believing that we would find it to the east, and we picked up a small seam, a very insignificant one, and followed that for a ways, and that was also faulted, and finally disappeared as a joint plane. That is all there is in that drift. * * * Later, when we came to that raise from the 500 of the Black Rock, we drove out to the northeast, expecting to intercept the seam that we had started from the 450 of the Black Rock vein. We ran out to station 84 and found a seam standing at that point nearly perpendicular, and followed it a ways to the southeast, and then they turned on a northwest-southeast seam and followed that to where the raise had holed.

"Q. Speaking of the seam that you followed from 67 to 68 and another that you picked up near station 70 and it was cut off again at 77—little seams like that can be found practically all over the district, can they not?

"A. Yes. * * * Running in various directions * * * apart from any vein.

"Q. When you brought the raise up to the 450 of the Black Rock—* * * You started off westerly on a seam? Describe that seam * * *

"A. Through 84 and 88 it was driven westerly, yes.

"Q. And 89, was this driven westerly and easterly and southeasterly from 84? * * *

"A. Yes, part of it was done under my direction, but I have not seen it since it was about 25 feet from station 84.

* * *

"Q. And this work driven out from 83 to 84 and thence the work easterly and westerly therefrom was done with a view of finding, if you could, the Pyle branch of that level?

"A. It was done in an endeavor to find the Pyle branch at that level."

And at page 218 he testified that he had been in for 25 feet in the westerly portion of the level from 84 to 89 and found there a small vein with 8 or 10 inches of quartz, with a gouge on the north side. That he had been in that part easterly or southeasterly from 84 and there was just about the same appearance there, as far as vein material is concerned.

"Q. And in that portion you found westerly from station 84 it dips to the south, does it not?

"A. At the crosscut it is almost perpendicular; it dips about 84 or 83 to the south. In the face as I saw it last it dipped about 80 degrees to the south."

He testified that "that part southeasterly from 84 dipped to the south also—those particular seams."

Professor John D. Irving, witness for plaintiff (page

224) at pages 250 to 254, gives a general description of the Pyle strand. At page 251 he says:

> "From the Black Rock 700 I have been up to the top of the raise" (meaning Pyle raise) "indicated here, which is dotted because it is a short distance to the west of the section line. And I was able to follow the vein in the raise for 26 floors from the Black Rock 700 level. Above that the raise was badly lagged and I was unable to observe and I do not know whether the Pyle strand continues further up than that or not."

On *cross-examination*, page 255, he testifies:

> "Q. Mr. Irving, will you please point out there on a section or a plan map the highest point where you saw the Pyle strand?
>
> "A. Exhibit 42. In the raise which extends upward from the 700-foot level of the Black Rock, the Pyle strand I was able to follow definitely up 26 floors. As far as I know that is the highest point at which I have personally been able to recognize that lode. • • •"

And at pages 255-6:

> "I can give you the distance up if you wish; • • • It is 184 feet above the 700-foot level."

And at pages 256-7 witness testifies as follows:

> "Q. Did you make any examination of the 500 of the Elm Orlu with a view of tracing it above that?
>
> "A. I did.
>
> "Q. What did you find up there?
>
> "A. I found some small irregular veins which may be a continuation of the Pyle, and they may not; I don't know.
>
> • • •

"Q. But as far as you know, it may continue upward, of course.

"A. *It may.*

"Q. *And you cannot say where in its upward continuation it will go?*

"A. *I don't know.*"

Walter Harvey Weed, called as witness for plaintiff, p. 277, at page 285, testifies:

"The Pyle branch of the Rainbow vein was first called to my attention in 1910, when I was invited to go to a raise starting in the stope on the 1200 of the Black Rock mine, and going upward as far as the 1000. That raise I went through in that year, and found the vein about 5 feet wide, which came upward with a northward dip, and was shown continuously in that raise. * * * "

And at pages 285-6:

"A subsequent development which was made as a result of the desire to know whether that vein did or did not come back and continue upward into the Elm Orlu ground, or whether it apexed in the Black Rock ground, resulted in the putting up of raises and the driving of crosscuts, which raises I have been up, and it shows a continuous development of that vein upwards to the 450-foot level of the Black Rock mine. From that point upward to the 500-foot level of the Elm Orlu mine a vein has been followed which appears to be cut off, or at any rate left a few sets below the 500-foot level of the Elm Orlu mine; so that, *while I believe that this vein can be traced on upwards,* it has not been actually developed at that point. The further development of the Pyle vein on this 1100 and up continuously in a raise to the 800, where in the 804 drift and the 821 drift of the Black Rock mine it has been exposed: upward then through to the 700-foot level, where

it is shown in a short drift running out from the crosscut, as well as in the raise; again in a drift of the 450-foot level of the Black Rock mine, where the Pyle vein is well shown. It may be that this Pyle vein continues eastward and is shown in the drift easterly from the Black Rock tunnel, in the drift easterly from the Wolvin tunnel, and in a strand or branch of the Rainbow shown here on the surface, but the connection between those points not having been establishel by raises, I am not positive as to the identity."

"Q. At the point where it has been developed to the highest elevation where you are absolutely positive of its identity, what is its dip?

"A. Practically vertical.

"The uppermost portion of the Pyle branch is beneath the Elm Orlu claim * * * as far as developed; or if this be as seems probable, the upper portion of the Pyle strand or Pyle branch, as I prefer to call it, then it is all within the Elm Orlu claim * * * the character of the vein as it goes upward to the point where you last are able positively to identify it * * * changes somewhat in its character and its thickness, but maintains its general character throughout, it being similar quartz to that of the Rainbow lode and similar mineralization * * * Its walls are continuous, and seeing this raise before it was timbered, * * * there could not be any doubt as to the identity of the vein which is followed upward."

On cross-examination, at pages 297-98:

"Q. You stated upon direct examination that you followed it up from the 450 Black Rock to a point I believe you said just below the 500 Elm Orlu where the vein appeared to have been cut off?

"A. Why, there is a small clay slip through there *which might or might not cut off the Pyle branch of the Rainbow lode.* * * * It would be

my judgment that it was cut and displaced somewhat there. * * * My recollection of it is that that clay slip is only a few inches, possibly as much as three inches in thickness, but it is faded out and broken so that the crushing of the granite is such that I should hate to say just exactly how wide that fault itself might be.

"Q. You stated that you believed that that ore or that vein, if we so characterize it, could be traced upward?

"A. Why, I know it was traced upward to this point. * * * I have indicated on the model the point at which it is no longer visible.

"Q. I understand that, Doctor. But you stated that you believed that that could be traced upwards, did you not?

"A. *I believe that vein could be traced further upward. How far I do not know.*

"Q. But in that connection you pointed to this working and mineralization as shown upon the model, saying that it might be this. Would you kindly define that so we can get it in the record?"

At pages 298-9:

"A. It is the extreme easterly drift from the Black Rock tunnel * * * It is drift marked No. 24 on plaintiff's Exhibit 8. * * * I have examined that drift. * * * I found a vein where I noted a two-inch width of quartz with clay slips on either side and in places vuggy, and of a silver vein type.

"Q. And, in your judgment, Doctor, is that the same vein that we found below, at or near the top of the raise extended from the 451 Black Rock crosscut?

"A. The evidence at hand is not sufficient to form a positive opinion and for that reason I have said (meaning in his notes) this *may be* the Pyle branch."

At page 299:

"* * * I have not sufficient information to make a positive correlation.

"Q. What is the dip of that vein that you find upon the map, plaintiffs' Exhibit 8?

"A. I have noted it would be nearly vertical. * * * because it may be slightly to the north in one place and slightly to the south in another."

Fred Searles, Jr., called as witness for plaintiff (p. 328), at pages 338-340, gives a general description of the Pyle branch on the lower levels of the vein on the 1000, 1100 and 1200 levels, and proceeds on page 338 as follows:

"Following that vein upward it is observable from the 1000 level up, the Pyle raised to the ninth, to the eighth where it is developed close to the Elm Orlu end line, then the raise to the 715 drift on up to the Pyle drift on the 450-foot level of the Black Rock and for some distance above. That is the raise which extends vertically above that drift. I was up that raise, and was about seven sets high, and the Pyle vein consisted of two walls with about an inch of gouge on each of them, and between there was about three feet of banded manganese and quartz, the whole being rather an impressive showing of vein material. * * * the raise (meaning the Pyle raise) had been connected with the 506 drift of the Elm Orlu mine and I noticed the exposure in the end of that drift was nothing like the exposure in the Pyle raise below that point. There is exposed in the 506 drift a blue gouge about two or three inches thick with quite a strong southerly dip. It dips from 55 to 75 degrees. 506 drift has been run on that gouge. I feel very sure that that does not represent the Pyle vein because when you get down to the raise below the 506 drift that gouge can be seen coming into the raise in the second

set, but the drift is going across the raise and out to the other side. While I have not been able to see the exact point of cut-off, I am very sure that the Pyle vein coming up that raise has been terminated by that gouge. * * * That is the top of the Pyle vein as far as I know. We spent a great many thousand dollars looking for it above there; we drove the Clark tunnel crosscut south with the idea of picking it up if it existed and drifted around connecting with the drift from the east shaft of the Elm Orlu, and in no place on these workings or in the raise above the 506 or in the Black Rock tunnel was anything that looked to me like the Pyle vein. There are some little slips in that, but there is no Pyle vein as far as I know. The top of the Pyle vein is just below the 506 drift in that latitude. * * * Its course is almost due east and west. * * * The Pyle vein, as far as I know, in the latitude of the raise, is all within the Elm Orlu claim. But it possibly extends at all points above the 800 level across the east end line of the Elm Orlu claim."

And at page 340:

"Reference has been made to the possibility of that strand of the vein shown in the cuts and on which the initials J. C. P. and B. and after being followed through C. B. G. H. L. and L. (Exhibit 4) —I mean, reference has been made to the possibility of that being the Pyle vein. I would not like to say that it was not the Pyle vein, but it is not entirely impossible that above the gouge represented as existing in the 506, where it does exist, the Pyle vein may exist and may continue upward to the surface. I don't know about that."

On cross-examination, page 352, he testifies that the highest level which has been driven on the Pyle

branch easterly of the Pyle raise is on the 800 level of the Elm Orlu and the 821 drift.

And at pages 354-5, he testifies:

"Q. Now, step to the model again. In addition to this little crosscut southeasterly from the raise shown on the model and marked 821 and 825, what other working is there easterly of the Pyle raise between that raise and the easterly end line of the Elm Orlu claim, if anything, in the way of a raise, or winze or any other opening?

"A. There is none.

"Q. What is the distance from the surface down to the 800-foot level of the Elm Orlu, easterly of the Pyle raise to (at) the east end line of the Elm Orlu? * * *

"A. About 650 feet at the latitude of the raise, but at the end line it would be * * * about 600 feet.

"Q. Now, westerly of the Pyle raise, what is the uppermost drift that you have on the Pyle branch of the Rainbow vein?

"A. The 900-foot level of the Elm Orlu.

* * *

"Q. How far is that beneath the surface vertically?

"A. It is about 825 feet.

"Q. And what is the distance from the last point you spoke of—

"A. The 908 drift.

"Q. At the easterly (should be 'westerly') end of that drift * * * what is the distance * * * to the east end of the Elm Orlu?

"A. 635 feet.

"Q. *And in that distance easterly and westerly of 635 feet and a vertical distance from the surface down to the uppermost working on the Pyle branch of from 600 to over 900 feet, this so-called Pyle raise is the only opening there is?* * * * *On the Pyle branch, I mean.*

"A. *Yes, sir; that and this little drift on the 450 Black Rock.*

"Q. How far beneath the surface is it where there is a drift running off from the Pyle raise westerly?

"A. 410 feet."

And at page 355 it appears that the little drift referred to by him is marked on Plaintiff's Exhibit 11 as drift 455, and that from the westerly end of that drift there is another raise started up; that that raise goes up from 451 crosscut; that in that raise the highest point at which he saw ore was on the sixth floor, which would be 48 feet above the 451 crosscut; that the vein there is about 4 feet wide; that is, on the east side of the raise the two walls had diverged a little, and there was a horse of granite in between, but the total thickness of the vein would be about the same. That he believes the vein was there cut off by a slip; that he had never seen the cut-off, but he had seen the slip; that the slip was now plainly visible in the 506 drift, and could be seen in the raise in the second and third sets below the 506 drift.

At pages 355-6:

"Q. As shown on the model that slip is further up the raise than the top of what is painted as ore and vein?

"A. It is on that side, but on the other side it is painted differently. I happened to paint that piece there, and I left that white because I had not actually seen the cut-off there, though I believed it was cut off."

He further testified that at this slip the real gouge referred to was about 2 inches thick; that its course or

strike is practically east and west; that it varies in dip between 65 and 75 degrees to the south.

"Q. Now, you say that there are many little slips and seams that interrupt and cut off veins that cannot be followed any considerable distance easterly or westerly or from one level to the other?

"A. That is certainly true in this mine.

"Q. And, can you say that that is true of this little slip?

"A. I don't think it could be followed very far.

"Q. Either on its strike or upward or downward?

* * *

"A. I think not.

"Q. You spoke, Mr. Searles, in your direct examination, of this Pyle branch as disclosed in the Pyle raise, having a northerly dip, and in one place I noted that you said it had a marked northerly dip. That is true of that part of the raise of the 801 crosscut down to where that raise connects with the big stopes below?

"A. Yes.

"Q. But from that 801 crosscut up it is standing vertical, is it not?

"A. Practically vertical, yes; there is an occasional offset in the raise, you see, to keep it in the vein."

And at pages 356-7:

"Q. What would you say that this vein will do that was four feet thick the last time you saw it; may it not do just as the main branch of the Rainbow did, namely, go over to the north, which would bring it over your Elm Orlu side line?

"A. Well, I don't think it will do that; I think it will die, because we have run a lot of workings up here, that if it had that dip that you speak of, that southerly dip, it would be intercepted in the Clark

tunnel somewhere. You see, if that vein continued up here with a dip to the south, it would come in these workings, and we could not find it anywhere.

"Q. It would not have to change very much in dip for it to do that between the surface and where you have disclosed at the uppermost point that you do see it with a width of four feet; it would not have to incline upward to the north very much in that three or four hundred feet to bring it over the northerly side line (of the Elm Orlu) at the apex, would it?

"A. It would have to change through the vertical and dip south. * * * It would have to dip about 80 degrees."

At pages 358-9, he says:

"Q. You had some little seams of ore in 506?

"A. Yes; there are little seams in there.

"Q. But you don't identify either of them with the Pyle branch of the vein?

"A. *I don't think I do.*

"Q. You don't think the Pyle branch of the vein is disclosed in any of that line of workings?

"A. *I failed to find anything that looks like it.*"

And at pages 358-9, he testifies that he does not think that the Pyle strand is found in the trenches D, F-2, G, H, I and L on plaintiff's map, Exhibit 4, but that it may be.

Horace V. Winchell, called as a witness for the plaintiff (p. 387), gives a detailed statement of his observations respecting the Pyle strand, at pages 400-403, and gives it as his opinion that the top of the Pyle strand is found in the raise in the 451 crosscut, about twelve floors up, where it terminates against the fault slip; that the

fault probably offsets the vein to the south, but the vein being very small, it may be difficult to distinguish it above that point.

And at pages 405-6, in reply to a question by the court, the witness testifies that the Pyle strand where cut off by the fault is small, that that fissure may possibly exist above it, yet he could not find it in the workings above, and if it were above, it would be offset slightly to the south and continue on upward in that position, but that the fault is not one of apparent great displacement.

And on cross-examination, pages 406-7, he testifies that a great many little faults are encountered in the underground workings of the Rainbow at various points that cannot be identified from level to level or traced or identified for any considerable distance in any direction.

> "Q. Now, the fault that you spoke of and which Mr. Searles referred to as the slip at the Pyle raise, have you ever been able to identify that slip with any other fault or slip in the mine?
>
> "A. Yes; I think that is the same slip that is followed in drift 506 to the west of it.
>
> "Q. You think there is no question about that?
>
> "A. No.
>
> "Q. But, apart from where you have it disclosed in that raise, in the drift therefrom, you have not been able to identify it with any fault or slip which you have found in the mine anywhere?
>
> "A. I haven't recognized it any other place."

He continued, that the dip of the slip as disclosed in the raise was 57 degrees to the south, and in the drift westerly the dip was 55 degrees to the south.

At pages 407-8:

"Q. Not knowing whether that slip has faulted the vein that you have been following up in the Pyle raise or whether it was terminated against that as a sub-fault apex, and having but that one exposure of that fault slip, that being the only place where you can identify it, are you able to say with any degree of assurance, if it were faulted, what the direction of the fault would be?

"A. Yes, with considerable assurance, because reverse faults are not common in this camp.

"Q. That would be the only reason?

* * *

"A. Yes.

* * *

"Q. Then are you able to say that that fault was a normal as distinguished from a reverse fault?

"A. Not positively.

"Q. It is largely, of necessity, is it not, from the slight exposure there, a matter of speculation?

"A. From the exposure it would be impossible to tell, but from general experience I have considerable assurance that it is normal. * * * I do not attempt to assert it as a fact, but I have given my best opinion in regard to it.

"Q. Have you given all the reasons that occur to you for that conjecture?

* * *

"A. I think so."

At pages 417-18, he testifies that the Pyle continued upward in the raise 95 feet above the 451 level. That the slip he had referred to as cutting off or faulting the vein, if it continued in its downward course, should have been found in the 451 crosscut to the south from the raise, and while there were a number of slips in that

crosscut, he had not been able in that crosscut to identify the slip in question.

See also pages 420-1.

Mr. Searles, being re-called (p. 809), testified at pages 816-17 respecting a new crosscut running from the top of the Pyle raise 18 feet south therefrom; and on cross, at pages 830-1, testifies that this crosscut had been started since the plaintiffs' case in chief closed; that at a distance of 10 or 12 feet (from the raise) he found a miniature vein or veinlet—he would hesitate to call it a vein—four inches of quartz and a tiny blue gouge with a dip to the south of 78 degrees; that he did not attempt to make any absolute correlation of that with any other vein—thinks it may possibly be the very top of a dying out end of the Pyle strand; that he would not be sure of that at all, and has not formed any opinion as to whether it is to be correlated with the Pyle or not.

We say with entire confidence that not a single witness called by plaintiffs-appellees testified that he found anywhere within the boundaries of the Elm Orlu claim the *top or apex,* or what he was inclined to believe was the *top or apex,* of the Pyle strand, save in the one place, namely: the so-called Pyle raise near the 500 level of the Elm Orlu claim at a point about 50 feet southerly of the northerly side line of the claim. And as to the disclosure of the Pyle strand in that raise, Mr. *Searles,* as we have seen, first gave it as his opinion that the Pyle vein was there terminated in its upward course by a fault which was encountered a short distance below the Elm Orlu 500 level; while Mr. *Greene* expressed no opinion as to

whether the top of the vein was or was not found in this raise. Mr. *Irving*, another witness on behalf of plaintiffs, testified that he was unable to say whether the top of the Pyle vein was found in that raise or not; that it might continue upward beyond that, and that he could not say where in its upward continuation it would go. And Mr. *Weed*, also, witness for plaintiffs, testified that he believed that the vein could be traced further upward, but how far it could be so traced he did not know.

Again, Mr. *Searles*, also, on cross-examination, Tr., p. 340, testified that the Pyle may exist and may continue upward and may continue upward to the surface; that he does not know about that.

On the other hand, Mr. *Burch* and Mr. *Wiley*, witnesses on behalf of appellant-defendant, each testified that the top of the Pyle vein was not found in the Pyle raise, but (that the vein) continued upward beyond that; that the workings were not such as to enable anyone to say definitely where the top or apex of that branch of the vein would be found; but that, in his opinion, it was more probable that it would be found in the Black Rock claim rather than in the Elm Orlu. (Testimony of Burch on direct, found at pages 668-670; on cross, 696-698; and Mr. Wiley on direct, pages 718, 721; and on cross, 742-3.)

The foregoing embraces the substance of all of the testimony on behalf of appellees touching this question.

Surely no discussion of this evidence is necessary to show that it falls far short of that measure of proof required to overcome the presumption of appellant's own-

ership of the ore bodies beneath the Black Rock east of the 301-foot plane.

The language employed by the Supreme Court of Montana in *Heinz et al.* vs. *B. & M. Co.*, 30 Mont. 487, is peculiarly pertinent here, namely:

> "Indeed, while they concede that there is a vein in the defendant's ground dipping to the south, their own contention is based exclusively upon the opinion of their engineers, that, if the vein having its apex in the Minnie Healy ground continues to dip at the same angle from certain points where it is exposed in the upper levels in their workings, it will reach the point where the defendant is conducting its operations. This is not sufficient to overcome the presumption that the defendant owns the ores found beneath its own surface. This presumption may not be overturned by speculative conjecture or even intelligent guess."

As is also the language of the late Judge Hawley, in *Consolidated Wyoming G. M. Co.* vs. *Champion Mining Co.*, 63 Fed. 540, where, at page 550, he says:

> "• • • But here we are met with the difficulty of determining from the evidence how far the apex of this vein (meaning the slate vein) is shown in the Ural claim after leaving the south end line of the Wyoming surface location. • • • The testimony as to the existence of the slate vein to certain points southerly, near the mouth of the Wyoming shaft, may be said to be fairly established by the evidence. South of that point to the southerly end of the Ural it is not well defined, and is not clearly proven. The court is left in doubt as to the truth. The impression received from an examination of the record might be said to be that the probabilities are in favor of that vein extending through the Ural ground, as claimed by complainant. But the court

is not prepared to say that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Year's and New Year's Extension claims, belonging to respondent. The respondent has the undoubted right to say to complainant, 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner.'"

Indeed, in the case at bar, the District Court reached the conclusion that the evidence failed to support the plaintiffs' contention in this regard. (See Opinion, Tr., pp. 43-44.) Clearly, therefore, we submit it was then the duty of that court to have entered a decree quieting defendant's title to all veins and ores found within the limits of the Black Rock easterly of the 301-foot plane. However, instead of entering such a decree, the court so framed, and intentionally so framed, its decree that it would not be a bar to a new suit which appellees might thereafter bring against this appellant to quiet title to all of the vein below the plane of union between it and the Pyle strand, if by further development they discovered additional evidence in support of their contention that the Pyle strand did apex in the Elm Orlu at the point of alleged forking and at its apex continued thence easterly to and across the east end line of the Elm Orlu.

The sixth paragraph of the decree is as follows: (Tr., p. 36.)

"Plaintiff Clark-Montana Realty Company, is the owner of and entitled to the possession (subject to the rights of said Elm Orlu Mining Company), of all that portion of the Pyle strand or vein *throughout its entire depth* as far as its apex is within the Elm Orlu lode mining claim from its divergence at its west end from the Rainbow vein in the Elm Orlu claim easterly as far as the apex of said vein or strand is within said claim—the rights of the said plaintiff upon said vein to be bounded on the east by a plane drawn downward vertically through the point where the south wall of the Pyle strand or vein at its top or apex and on its course passes out of the Elm Orlu claim, and on the west by a parallel plane thereto drawn downward vertically through the westernmost point of said Pyle vein at its divergence from the Rainbow vein within the Elm Orlu claim, and such bounding planes extended indefinitely northerly and southerly in their own direction." (Italics ours.)

Appellant in its answer alleged ownership of these ore bodies—presumtively they belonged to it—and filed its cross-bill in which it prayed that its title thereto be quieted as against an adverse claim of title made by the appellees. The trial court concluded that appellees' adverse claim of title to all of these ore bodies easterly of a plane parallel to the west end line of the Elm Orlu drawn through a point 301 feet easterly of the southwest corner of the Black Rock, was unsupported by the evidence, and yet so framed its decree as to leave the question of ownership of these ore bodies wholly undetermined, as much so, as it was when the original bill of complaint was filed. Under that decree, so far as the title to these ore bodies

is involved, the trial was abortive. The cause having been tried and heard upon its merits, a decree upon the merits should have been entered—such a decree as would constitute a bar to a subsequent action between the same parties upon the same claim or demand.

We have been required by appellees to once litigate the question of ownership of the ore bodies east of the 301-foot plane—in which litigation they failed, as we have seen, to establish their alleged title. Can it be true that under such a state of facts, the court may properly so frame its decree in the cause as to enable appellees thereafter, upon the discovery of alleged new evidence, to bring a new suit based upon the same claim of ownership, to quiet title to the same property? If so, when is the litigation to end? If permitted to prosecute a second suit to quiet title to the same property, based upon the same claims of title, and therein they again fail to establish their claim of title, may the decree in the second action be so framed as to enable them to bring yet another suit based upon alleged additional evidence, and so on *ad infinitum?* Clearly, the appellant as to the ore bodies in the Black Rock east of the 301-foot plane was entitled to a decree quieting its title thereto without any qualification.

The appellees would not or ought not to be permitted, after final decree, to file even a supplemental bill in the original suit and under it further litigate the question of title, for the application for leave to file a supplemental bill upon the ground of alleged newly discovered evidence must be denied if it appears that had the plain-

tiff exercised reasonable diligence such evidence would have been ascertained before and would have been available to him on the former trial.

In *Jenkins* vs. *Eldredge, et al.*, 3d Story (same case, Vol. 13, Federal Cases No. 7267), Story, Circuit Justice, at page 507, says:

> "The real question, therefore, for the consideration of the court, is, whether leave should be granted to file a supplemental bill to bring forward the new evidence. In substance, there is no difference between this case *and the case of leave to file a bill of review,* or a bill in the nature of a bill of review, except, that the latter is solely applicable to cases where there has been a final decree; whereas applications, like the present, may be before or after an interlocutory decree. But the doctrine of the court, as to the nature of the evidence, which will justify and support the application, is, in each case, substantially governed by the same considerations, and limited by the same rules. I had occasion to consider this subject with a good deal of attention in the case of *Baker* vs. *Whiting,* and with the opinion then expressed, I am entirely satisfied."

And at pages 509-510, it is said:

> "In the next place, leave is never given to file a supplemental bill, in order to admit new evidence, after an interlocutory decree, where the party might, by due diligence, have introduced it originally into the cause, or had full and ample means of knowledge of it, within his reach. It matters not, that he, or his solicitor or counsel, did not understand the true value or importance of it, if they knew the facts, *or had ample means of knowledge*, and *a fortiori*, if, by the very nature and character of the matters put in issue, they were bound to search, and to make full and perfect inquiries. The authorities are very num-

erous and pointed to this effect. But it will be sufficient upon such a subject, to refer to a few leading authorities. In *Young* vs. *Keighly*, 16 Ves. 348, 353, Lord Eldon said, that in cases of this sort, the question always is, not what the plaintiff knew, but what, using reasonable diligence, he might have known. *Norris* vs. *LeNeve*, 3 Atk. 26; *Whitelock* vs. *Baker*, 13 Ves. 511; *Bingham* vs. *Dawson*, Jac. 243; *Barrington* vs. *O'Brien*, 2 Ball & B. 440; and *Blake* vs. *Foster*, Id. 457, 461, are to the same effect. Mr. Chancellor Kent fully recognized the same doctrine in *Wiser* vs. *Blachly*, 2 Johns. Ch. 488, and *Hammersley* vs. *Lambert*, Id. 432, 436; and in *Livingston* vs. *Hubbs*, 3 Johns. Ch. 124, 125, the same learned judge said (which is very pointed to the present case): 'The defendant was charged in the bill, with gross misrepresentations on that point, and the charge was denied on the answer, and put at issue. The defendant's attention was called to the very fact, and he was bound to use reasonable diligence in bringing forward his proof on that point.' * * * There is, also, in the case of *Respass* vs. *McClanahan*, Hardin, 352, 354, which has been already referred to, another highly important remark, illustrative of the doctrine just stated. The court there said: 'We will add, that there is an important difference between the discovery of a matter or fact itself, which, though it existed at the former hearing, was not then known to the party to exist, or which was not alleged or put in issue by either party, and the discovery of new witnesses or proof of a matter of fact, which was then known, or in issue. In the former case, the party, not knowing the fact, and it not being particularly in issue, there was nothing to put him in the reach, either of the fact or the evidence of the fact; and, therefore, the presumption is in his favor, that as the matter made for him, his failure to show the matter was not owing to his negligence or fault. But where the matter was known,

or put in issue, the party is put upon the investigation, and the presumption is strong, that, by using due diligence, he might have shown the truth of the matter, on the former hearing.'"

And at page 506, speaking of rehearings in equity, it is said:

"* * * Besides, it is no small recommendation of our practice, that it thereby requires, in the first instance, on the part of counsel, a thorough examination and preparation for the hearing; and on the part of the court, a most solicitous, and exact study of the whole cause, before the judgment is pronounced. The other course would encourage inattention or indifference, and induce the counsel, as well as the parties, to speculate upon contingencies, and to argue the cause at large, only, when the court had delivered the result of its opinion."

In Volume I, *Whitehouse Equity Practice*, treating of bill of review on the ground of newly discovered matter, it is said in Section 145, page 283:

"Such new matter, however, must be relevant and material, and such as would have been likely to produce a different determination. It must first have come to the knowledge of the party after the time when it could have been used at the original hearing, and must be such as the party by the use of reasonable diligence could not have known."

In *Mosgrove et al.* vs. *Kountze et al.*, 14 Fed. 315, the first paragraph of the syllabus, which is borne out by the text, is as follows:

"Leave will not be granted after decree to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence,

have been ascertained, and pleaded by way of amendment in the original suit."

See, also,

Henry et al. vs. *Traveler's Insurance Co.*, 45 Fed. 299;

Mitchell vs. *Bix Six Development Co.*, 186 Fed. 552, 559-560;

See, also,

Pittsburg Reduction Co. vs. *Cowles Electric Smelting & Aluminum Co.*, 64 Fed. 125, 127-8.

So, also, a court of equity after final decree entered will refuse to entertain a motion for re-hearing on the ground of newly discovered evidence if it appear that but for the moving party's negligence or lack of diligence the alleged newly discovered evidence would have been available on the original hearing.

See,

Giant P. Co. vs. *Cal. Vigoript Co.*, 6 Sawyer, pages 508-531;

Pittsburg Reduction Co. vs. *Cowles Elec. Smelting & A. Co.*, 64 Fed. 125.

In *Kenerdine* vs. *Phelan*, 1 Phila. 303, it is said at page 345:

"New trials are not granted to give a party the benefit of an invigorated case."

In *Brainard* vs. *Morse*, 57 Vt. 320, the court says:

"Sound policy requires that when parties have had a reasonable opportunity to get their proofs and have them heard and passed upon, there should be an end to litigation; any other rule would be intolerable."

In *Champion* vs. *Ulmer*, 70 Ill. 322, it is said by the court at page 323:

> "The relaxation of these rules would encourage litigation, and reward ignorance and carelessness at the expense of the opposing party."

In *Birdwell* vs. *Cox*, 18 Tex. 535, it is said:

> "He should not have a second trial solely for the purpose of giving him a fresh opportunity to do what might and should have been done at the first."

In *Rincus* vs. *Brewing Co.*, 18 Wash. 108, the court says:

> "He simply took chances on obtaining a verdict from the jury on the testimony which he then had at hand; and having elected to submit his case to the jury on such testimony, he cannot now be heard to complain that the testimony was insufficient, and that he could, on another trial, produce more and better testimony. If this practice were tolerated, no reliance could be placed on a judgment, and it would become a favorite practice with litigants to obtain a second trial, if unfortunate in the first, by neglecting to procure all the testimony which might originally have been procured in the case."

In *Crowell* vs. *Harvey*, 30 Nebr. 570, the court at page 574 says:

> "If new trial could be had for such a reason, it would offer a premium for forgetfulness and dereliction of duty."

And in *Burnley* vs. *Rice Co.*, 21 Tex. 171, it is said at page 183:

> "Law suits, as has been said, would indeed be immortal while men are mortal."

Now, plaintiff knew when they filed their original bill that under the long and well established rule the burden would rest upon them to show, to the satisfaction of the court, that the Pyle did have its apex in the Elm Orlu, as alleged in their bill, and that it was traceable continuously from such apex to a union with the Rainbow. They knew that they must fail in their contention unless they were prepared with evidence to make this showing. And yet, they voluntarily proceeded to trial without having prosecuted the necessary development work to even ascertain where, if at all, easterly of the 301-foot plane, the apex of this branch or strand could be found and identified as such within the Elm Orlu. Surely that degree of diligence which the ordinarily prudent man daily observes in the conduct of his business would have prompted plaintiffs to have done all work that was necessary and indispensable to the maintenance of their contention, before proceeding to trial.

A plaintiff in equity who voluntarily chooses to bring his suit on for hearing before he is prepared to present to the court evidence which is indispensable to a successful maintenance of his alleged cause of action, does so at his peril. If he fails to do so, his defeat will be attributable to his own folly or neglect. After the entry of final decree, he ought not to be permitted to file even a supplemental bill in order that thereunder he may present additional evidence which, had he exercised reasonable diligence, would have been available on the former trial. This would seem to be the well-settled rule and its observance is essential to the orderly administration of justice.

A failure to adhere to it must result in encouraging litigants to speculate, to trifle with their opponents and the court,—to take the chance of winning a case not properly prepared, knowing that if defeated they will have lost nothing, since they will be permitted to supply the omitted and essential evidence under a supplemental bill, or that, when better prepared, they will be permitted to bring a new suit and again litigate these same questions of law and fact. Any such relaxation of the settled rule is not in furtherance of justice, nor can it receive the sanction of a court of equity which exacts diligence of its suitors. It will not suffer them to litigate controversies by piecemeal, but insists that before they submit their cause for final decree they shall bring before the court all evidence in support of their contention, which, by thorough preparation and reasonable diligence, would have been made available to them.

The case of *Quaint* vs. *McMullen*, 103 Cal. 381, was a suit to quiet title, in which the defendant disclaimed any other interest in the land than that the lands were situated within the boundaries of an irrigation district and that the same were sold to defendant on account of an assessment, levy of a tax, and delinquent sale thereunder, for the benefit and at the instance of the irrigation district. The court found that the plaintiff was the owner in fee and that there was no adverse claim of defendant to be determined in the action. The plaintiff appealed from that portion of the judgment or decree reading as follows:

"That any right which said defendant, John

McMullen, may have acquired by or through the purchase of said pieces or parcels of land at a sale thereof on October 16, 1893, by the collector of Central Irrigation District, for delinquent assessments on said pieces or parcels of land, levied on the same for the purposes of said district, is not in any manner affected or determined hereby."

The court, in its opinion, pages 382-3, says:

"* * * The course followed by the learned judge of the trial court in the rendition of this form of judgment is certainly somewhat out of the ordinary * * * Respondent now insists that plaintiff is appealing from a judgment rendered in his own favor, and that portion of the judgment from which the appeal is taken is pure surplusage, and entirely harmless. If such be the fact, we are at a loss to understand why defendant set up these things in his answer, for, believing as he does, he should have appeared, disclaimed any interest, and allowed judgment to be taken against him quieting plaintiff's title. But we think his contention is unsound. The only object of plaintiff's cause of action was to quiet his title against this delinquent assessment sale; and to quiet his title, expressly reserving as an open question the *status* of the property as affected by such sale, was a fruitless victory. Theoretically the judgment was in his favor; practically it decided nothnig, for, after the judgment of the trial court, he knew no more as to the *status* of his realty than he did before he brought this action.

"Under the foregoing circumstances we think the plaintiff has a proper appeal before the court. The right of appeal is remedial in its character, and in doubtful cases the right should always be granted. Plaintiff was entitled to a judgment without any reservations or exceptions, either refusing or granting his prayer to quiet title. The reservation in this judgment is the portion of which he makes complaint,

and he is necessarily injured and aggrieved thereby, for in effect it renders the judgment in his favor a nullity."

To like effect is the case of *People* vs. *Gold Run Ditch and Mining Co.*, 66 Cal. 155.

We deem it unnecessary to multiply authorities in support of a legal proposition, the truth of which is seemingly self-evident.

After all the evidence of the respective parties had been received and it appeared therefrom that plaintiffs had failed to show that the apex of the Pyle was found within the Elm Orlu, it would have been prejudicial error for the trial court to have permitted plaintiffs to dismiss without prejudice so far as the Pyle was involved, for defendant's right to a decree quieting its title to all ore bodies within the Black Rock claim east of the 301-foot claim had then been established,

See *City of Detroit* vs. *Detroit Street Railway Co. et al.*, 55 Fed. 569, 572 et seq;

Callaghan vs. *Hicks*, 90 Fed. 539-542, 543;

Electrical Accumulator Co. vs. *Brush Electric Co.*, 44 Fed. 602-604.

III-a.

In the Circuit Court of Appeals appellees contended that "inasmuch as the complaint in the action did not charge that the Pyle vein united or joined on dip the main strand of the Rainbow found beneath the surface of the Black Rock claim, the question of union or non-union was not in issue and that the trial court was not called upon to determine any such question."

True, the complaint does not expressly allege that the Pyle in its downward course united with the Rainbow lode in the Black Rock ground, but it was not necessary that it should contain any such allegation in order that the question of "apex in the Elm Orlu" and union at depth with the Rainbow vein in the Black Rock claim easterly of the 301-foot point might be litigated.

Plaintiffs claimed priority for the Elm Orlu claim; alleged that one branch of the Rainbow vein, namely, the Pyle, continued at its apex from the point of forking easterly to and across the easterly end line of the Elm Orlu claim; that this branch in its downward course so far departed from the perpendicular as to extend beyond the northerly side line of the Elm Orlu into and beneath the surface of the Black Rock claim; that plaintiffs were the owners of said vein throughout its entire depth; that defendant asserted an adverse claim or interest therein and prayed that such adverse claim be adjudged to be null and that plaintiffs' title to said vein be quieted. Under such allegations the plaintiffs had the undoubted right to show, if such were the fact, that the Pyle did at depth unite with the Rainbow easterly of the 301-foot claim. Had the defendant, when plaintiffs offered testimony which they claim tended to show such a union, objected thereto on the ground that all such evidence was incompetent and irrelevant as not being within the issues tendered by the complaint, such objection would, of course, have been overruled as frivolous.

Now, it will not be disputed that on the trial of the cause plaintiffs-appellees strenuously contended that the

Pyle branch of the Rainbow lode not only extended through the Elm Orlu claim to and across the east end line thereof, but in its downward course it united with the Rainbow lode east of the 301-foot claim. That such was the contention of the plaintiffs at the trial is shown in the trial court's opinion, where, at page 39 of the record, it is said:

> "Plaintiffs allege that the apex of the Pyle strand is in the Elm Orlu and crosses the Elm Orlu east end line, and that the vein on strike and dip unites with the Rainbow vein; and defendant denies all thereof at points east of the Rainbow apex crossing of the common side line that would give extralateral rights to plaintiff."

The defendant having thus been compelled by plaintiffs at the trial to litigate these questions with them, and plaintiffs having therein failed to establish any right, title or interest whatever in or to any of the ore bodies found beneath the surface of the Black Rock claim easterly of the 301-foot claim, the defendant was entitled to a decree quieting its title to all such ore bodies notwithstanding the fact that the complaint contained no express allegation of union or junction of these veins.

In the Circuit Court of Appeals appellees also contended that in the absence of evidence there is a presumption of law—the Elm Orlu having passed to patent—that the Pyle did have its apex therein and that it extended at its apex to and across the east end line of the claim. So far as intralimital rights alone are concerned, there is a presumption, in the absence of any evidence to the contrary, that a patented mining claim

is laid lengthwise of the discovery vein, and that the same extends throughout the length of the claim. But when the owner of a mining claim asserts the right to pass beyond his vertical boundaries and to enter beneath the surface of an adjoining claim owned by his neighbor, he is met by the opposing presumption that everything beneath the surface of his neighbor's claim belongs to him, and this latter presumption can only be overcome by clear and satisfactory evidence that the ore bodies beneath the surface of such adjoining claim belong to a vein which has its apex in the claim of the party asserting extralateral rights, and that from an apex in such claim the vein is continuous in its downward course between planes which would embrace the ore bodies put in controversy by the action.

In *Lindley on Mines*, Vol. 3, sec. 780 (at page 1899 et seq.), the learned author says:

> "In another section of this treatise in dealing with the subject of burden of proof in actions of trespass, we have expressed the view that where an outside apex proprietor seeks to justify his presence underneath the surface of another's property, the burden is upon him to establish his rights by a preponderance of evidence. In other words, he is called upon to prove that within the boundaries of his claim there is an apex of a vein traversing the claim in such a direction as to permit the exercise of an extralateral right in accordance with the rules heretofore discussed. In other words, to quote from Judge Hawley's opinion in the *Consolidated Wyoming Mining Co.* vs. *Champion Mining Company:* 'Hands off of any and everything within my surface lines, extended downward vertically until you prove you are

working upon and following a vein which has its apex within your surface claims.'

"We have always been of the opinion, and we think it supported by the weight of authority, that in justifying his presence underneath foreign territory, the apex claimant is not aided by any presumptions of fact flowing from the patent with regard to the position of the apex and its course through the claim; that the conclusive presumption as to the validity of the patent is confined to the surface area and its vertical boundary planes, that is, to its intralimital rights which are subject to a right of invasion only by an outside apex proprietor—a right reserved by law and expressed in the patent. In other words, a lode patent does not raise any presumption in justification of the invasion of another's territory, as to the position of the apex or the course of the vein, but these facts, when challenged by the proprietor of the invaded claim, should be proved by the apex claimant, regardless of presumptions flowing from the patent."

See also Sec. 866 (at pages 2166-2171).

In *Hyman* vs. *Wheeler*, 29 Fed. 347, the seventh paragraph of the syllabus (which is supported by the text, page 356,) is as follows:

"Plaintiff's location and defendant's location are some distance apart, and they overlap so that the north end of the plaintiff's location is nearly parallel to defendants' location for about the distance of seven hundred fifty feet. In asserting a right to follow a vein or lode on its dip without his own location and into defendant's location, plaintiff must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other."

In the case of *Grand Central Mining Co.* vs. *Mammoth Mining Company,* 29 Utah 490, the Grand Central (plaintiff) brought its action against the Mammoth Company (defendant) to recover the value of ores extracted by defendant from beneath the surface of the Silveropolis and Consort mining claims owned by plaintiff. The defendant answered denying the material allegations of the complaint and filed a cross-complaint in which it was alleged that the defendant, Mammoth Mining Company, was the owner of the Mammoth Lot 38 laid in a general northerly and southerly direction; that there was a vein in the Mammoth Lot 38 which at its apex and on its course crossed the southerly end-line of that claim and continued thence northerly between the side-lines of the claim for a distance of 1100 feet; that this vein dipped in a westerly direction and in its downward course continued without interruption from the apex to and beneath the surface of the Silveropolis and Consort claims of the Grand Central Company, and that the defendant, Mammoth Company, was entitled to follow the vein extralaterally between planes drawn one through the southerly end-line of Lot 38 and the other parallel thereto through a point 1100 feet northerly therefrom, and that all ore bodies underneath the surface of the Silveropolis and Consort claims south of said 1100-foot plane belonged to the vein so alleged to have its apex in the Mammoth Lot 38 and was the property of the Mammoth Company. The case was tried upon the cross-complaint and answer thereto, and at page 67 the Court says:

"Where a person owns a patented mining claim, although the statute reserves the right to locators of other mining claims to follow their veins under its surface and extract ore, he is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface and everything else appertaining to the claim; and such presumption continues until some other locator or owner establishes the fact that he is entitled to exercise the reserved rights by virtue of the statute. 'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until someone can show a clear title to it as a part of some lode or vein having its top or apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until someone shall show by a preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere.' *Leadville Mng. Co.* vs. *Fitzgerald*, 4 Morrison Mining Rep. 380; * * * To overthrow this presumption and establish its right to its neighbor's ground to extract ore, the burden of proof was upon the defendant (the Mammoth Mining Company), and it is incumbent upon it to show, by a preponderance of the evidence, not only that the apex and strike of the vein were in Lot 38, north of the south end-line of the Silveropolis mining claim extended to the 1100-foot line, but also to show, etc. * * * In other words, the burden was upon the appellant to show by a preponderance of the evidence whatever was necessary to bring it within the terms of the statute in order to entitle it to the disputed ore bodies, or to justify it in the extraction of ore from its neighbor's ground. (Citing cases.)

"We concede, as claimed by the appellant, that a patent to a mining claim raises a conclusive pre-

sumption that there is an apex of a vein within the patented ground (1 *Lindley on Mines,* Sec. 305); but there is no presumption that it is the apex of the vein in dispute, and such presumption applies equally to the Silveropolis and Consort mining claims as to Lot 38 and does shift the burden of proof in this case as to the apex and continuity of the vein and the ore in controversy."

See, also, *Lawson* vs. *U. S. Mining Co.*, 207 U. S., p. 1, wherein the Court, at page 8, says:

"Title by patent from the United States to a tract of ground theretofore public, *prima facie* carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is part of the vein apexing in a claim belonging to some other party. But this is a matter of defense, and while proof of ownership of the apex may be proof of the ownership of the vein descending on its dip below the surface of property belonging to anotier, yet such ownership of the apex must first be established before any extralateral right to the vein can be recognized."

See, also, *Keely* vs. *Ophir Hill Con. Mng. Co.*, 169 Fed. 601, 602;

Boston & M. Consol. C. S. M. Co. vs. *M. O. P. Co.*, 188 U. S. 632, 638.

In the case of *Armstrong* vs. *Lower*, 6 Colo., relied upon by appellant in the lower court, the matter of intralimital rights only was involved.

In the case of *Work M. & M. Co.* vs. *Doctor Jackpot M. Co.*, 194 Fed. 628, also relied upon by appellees in the Court of Appeals, the facts were these: Plaintiff brought its suit in ejectment alleging that it was the owner of the Lucky Corner patented mining claim; that within the boundaries of said claim there was found a vein called the "No. 1," which was not the discovery vein, but which at its top or apex crossed one of the located end-lines and at a distance of 700 feet departed from the claim over one of its side-lines; that there was also another secondary vein called the "Timber Drift" vein, which at its top or apex traversed the claim diagonally passing through both of the located side-lines thereof; that the No. 1 vein was continuous and uninterrupted from its apex in the Lucky Corner to and beneath the Little Clara claim owned by the defendant, and that the plaintiff was entitled to extralateral rights thereon between planes, one drawn vertically downward through the end-line of the claim so crossed by the No. 1 and another parallel thereto through the point where it departed from the side-line of the claim; that the Timber Drift vein was continuous and uninterrupted from its apex in the Lucky Corner to and beneath the surface of the Little Clara, and that the plaintiff owned the same throughout its entire depth between planes drawn parallel to the located end-lines of the Lucky Corner through the points where the Timber Drift vein crossed the respective side-lines of the claim. (The plaintiff asserted no extralateral rights whatever based upon the discovery vein.) The answer of the defendant admitted that the "Lucky Cor-

ner'' was a patented claim; admitted that the secondary vein No. 1 and Timber Drift had their apices in plaintiff's claim, as alleged in the complaint, and that each was in its downward course continuous and uninterrupted from its apex to and beneath the surface of the Little Clara. The bounding planes of the secondary vein No. 1 and Timber Drift, if plaintiff were entitled to pursue the same, would embrace the premises in controversy in the action. The defendant sought to show that, notwithstanding the Lucky Corner claim was a patented claim, there was in fact no discovery vein therein; that there was no vein whatever at the so-called discovery point of the Lucky Corner. The Court held that the fact of discovery was conclusively determined by the issuance of the patent and that since under the laws of Colorado the locator of a mining claim was required to post his notice at the point of discovery and to sink a shaft within a given period to a depth of ten feet disclosing a well-defined crevice, the issuance of the patent conclusively determined that there was a vein at the so-called discovery point and that in the absence of countervailing evidence there was a presumption that the discovery vein ran lengthwise of the claim and not across its side-lines. So far as the case at bar is concerned, we need not quarrel with the decision in the Doctor Jackpot case; nevertheless, we invite the attention of the Court to the masterly criticism thereof found in Section 780 of *Lindley on Mines* (Third Edition).

If the decree so far as it relates to the Pyle strand is permitted to stand, it would mean that in every case that

may hereafter arise in which an owner of a mining claim brings suit to quiet title to ore bodies found beneath the surface of his neighbor's territory, basing his claim to relief upon the contention that such ore bodies belong to or are a part of a vein, the apex of which is in his, plaintiff's, claim, may voluntarily proceed to trial and notwithstanding he fails therein to establish that the vein does apex in his ground, yet he will be entitled to have a decree entered in the cause which will leave the way open to him to maintain a new suit to quiet title to the same ore bodies and therein be at liberty to again contend that these ore bodies lie in a vein which has its apex in his claim. Or, again, if at the conclusion of the trial in the first action it is left uncertain to what extent, if at all, the controlling apex is found in plaintiff's claim, he will be entitled to have a decree entered quieting his title to the vein throughout its entire depth in so far as future developments may show that the apex thereof is in his territory. This would seem to be a travesty upon the administration of justice. Such a decree, of course, would determine nothing respecting the ownership of the ore bodies in controversy in the action. The question of title thereto would remain precisely as it was before the suit was commenced. The litigation would have accomplished nothing. In effect, the only thing adjudged by such a decree would be that the trial, no matter how protracted and expensive it may have been, was a vain and idle ceremony which served no purpose.

IV.

THE DEED.

On the 29th day of October, 1906, the plaintiff, Clark-Montana Realty Company, executed and delivered to Amasa P. Peake, appellant's predecessor in interest, a deed whereby, for the expressed consideration of $1.00, it conveyed to Peake, his heirs and assigns, forever, all of its right, title and interest in the Black Rock claim, the language of the deed, so far as material here, being:

> "That the said party of the first part * * * does remise, release and forever quit-claim unto the said party of the second part, and to his successors forever, all the right, title, interest, claim and demand of the party of the first part in and to that certain portion, claim and mining right, title and property on those certain ledges, veins, lodes or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in Silver Bow County, State of Montana, the following described mining property, to-wit:
>
> "An undivided one-fourth (¼) interest in and to that certain quartz lode mining claim, known as the 'Black Rock' quartz lode mining claim, designated as Lot No. 53, Mineral Survey No. 596, in Township 3 N., R. 7 W., embracing a portion of Section 6, in Township 3 N., R. 7 W.
>
> "It being the intention of the party of the first part to convey to the party of the second part all of its right, title and interest in and to the above described property.
>
> "Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal-bearing quartz, rock and earth therein. * * *" (Tr., p. 27.)

The true consideration for this deed was fifty thousand dollars ($50,000.00) in cash and stock of the Butte-

Superior Company of the value of two hundred thousand dollars ($200,000.00). (Tr., p. 435.)

Appellant insists that this conveyance operates to grant the fractional interest in "all earth, rock and ores" found within the exterior limits of the Black Rock claim extended downward vertically.

Montana Mining Co. vs. *St. Louis Mining & Milling Co. of Montana*, 204 U. S., p. 204.

See, also:

Bogart vs. *Amanda Consolidated Gold Mining Co.*, 32 Colo. 32.

If the language of the deed is to be given effect according to its plain and unambiguous import, it does, of course, cover and embrace all ore bodies found beneath the surface of that claim.

But appellees contend that this plain letter of the deed must be so restricted as not to include any ore bodies which lie in a vein the apex of which is found in the Elm Orlu claim.

Now, it is well settled that if the language of a deed or other contract is susceptible of two interpretations, the court, when called upon to construe it, will, so far as may be, put itself in the position which the parties occupied when they employed the language, the meaning of which is in controversy; that is to say, the court will inquire into the circumstances—the conditions—surrounding the parties at the time of the execution of the instrument and avail itself of the light thus afforded to discover the true

intent and meaning of the parties thereto, and when that intention is thus ascertained, the deed must be so construed as to give effect thereto, if this can be done without violence to the plain letter of the instrument.

Salt Lake City vs. *Smith*, 104 Fed. 457-462;

Pressed Steel Car Company vs. *Eastern Ry. Co.*, 121 Fed. 609, 611;

United States Fidelity & G. Co. vs. *Board of Commissioners*, 145 Fed. 144, 148;

Bates County, Missouri, vs. *Wills*, 190 Fed. 522, 527-8.

What, then, was the situation of the parties to this instrument at the time of its execution?

Prior thereto, the Black Rock shaft had been sunk upon the Rainbow lode to the 700 level and considerable other development work done upon that vein, from which development both the grantor and grantee well knew that the Rainbow was a large and valuable lode or vein. At that time the existence of the so-called Pyle branch, wherever its apex may be, was unknown to either party.

See testimony of *Pyle* (Tr., p. 124,) and *Senator W. A. Clark*. (Tr., pp. 131-2.)

Mr. Greene, as already appears, testified (at pages 181-2), that in December, 1913, there was no surface working within the limits of the Elm Orlu east of the Trenches F-1, F-2 and F-3, except the "East Shaft" workings therefrom (in which it is not claimed nor pretended the Pyle is disclosed), and that the distance from these trenches to the east end line of the claim is, roughly, 650 feet.

Moreover, according to the contention which the grantor, Clark-Montana Realty Company, now advances, the Jersey Blue vein had not then been discovered, nor was it known to have any existence. In short, at the time of the execution of this deed, so far as either party had knowledge, there was nothing of any value whatever within the Black Rock claim, except this Rainbow lode.

These matters will be made manifest by the testimony as to the development theretofore made in the Black Rock claim, and the testimony of Mr. Winchell and Mr. Searles, to which we will refer.

Mr. John H. Simpson, pages 438-440, testifies that he first became acquainted with the Black Rock claim in the fall of 1903; that he then became interested in a lease obtained from Senator Clark and his co-owners, and that the deepest working at that time in the Black Rock was 400 feet; that in 1904 the lessees carried on some mining operations, all east of the shaft; that in the year 1905 they sunk a shaft to what is called the 500 level; that during the time the lessees were operating, they also drifted easterly on the 500 about 300 feet; that the leasing operations ceased in September or October, 1906; that the lessees, at the end of the drift east, crosscut the vein where it had a width of something like 80 feet; that when the lessees ceased operations the shaft was down to the 700-foot level.

R. C. Davis (Tr., pp. 539-541), testifies that he was superintendent of the Butte & Superior Copper Company from October or November, 1906, until 1909; that in the fall of 1906 the shaft was down to the 500 level; that

there were some old workings above the 500 surface workings and the 250, 350 and 450 levels; that in the latter part of 1906, and practically all of the year 1907, the company was engaged in sinking the shaft and that under his superintendency the shaft was continued from the 500 to the 1600 level; that on the 1000 level a cross-cut was driven south from the shaft a distance of 135 feet; that on the 1200 the drift was driven east on the vein 300 feet.

All of this work, according to appellant's contention, must have been on the Rainbow lode.

Mr. Winchell, pages 397-8, referring to plaintiff's Exhibit 8, testifies that the drift east of the Black Rock tunnel followed the Jersey Blue vein for a distance of about 55 feet and then left the vein and turned in the direction toward the discovery shaft of the Black Rock, and continues as follows:

> "I requested that the Jersey Blue vein be followed to the southeast commencing at the point in the Black Rock tunnel drift where it could be seen departing from the drift on the south side. This drift was extended upon the Jersey Blue vein, through stations 838, 836, 865, 1002, 850 and 1052, to the point where the Jersey Blue is intersected by the Black Rock fault. * * *"

(The work here referred to is new work, done since the litigation commenced.)

At pages 398-9, he testifies that the Rainbow vein is disclosed at or near the discovery of the Black Rock, and, continuing, says:

> "From these workings I draw the conclusion

that the vein which crosses the west end line of the Black Rock claim does not extend easterly to the point of discovery; in other words, that there is no vein extending from the point of discovery westerly across the west end line of the Black Rock. * * * That the discovery point is upon a vein which crosses both side lines of the Block Rock claim."

(The Rainbow lode, of course, is the only one which does cross the side lines thereof.)

And *Mr. Searles*, pages 342-3, referring to plaintiff's map, Exhibit 8, and the drift shown thereon from Station 836 to 1114, says, page 342:

"* * * That is not a strand of the Jersey Blue; it is cut off right at station 836; you can see the Jersey Blue vein going by 836, 863, 1002, and the vein in there is, as the Jersey Blue usually is, rather a small straight vein, * * * and it only extends through that drift from 836 to 1144 (1114 ?) and on a little, about 40 feet toward 1120, and that is all there is of it."

"Q. Now, I note that all those workings are aimed toward the discovery shaft of the Black Rock, and that some of them have been carried on over to that point. State whether or not those workings or any of them have been carried on the Jersey Blue vein or any portion of the Jersey Blue vein or upon any vein from station 831, 835, from 836 easterly beyond the points which you have already indicated.

"A. No, there is no vein there from this drift through station 199 and 800 and along No. 843, which is about the point at which the Violet gouge is marked crossing it going toward station 1120, it is in barren granite; there is no vein of any kind in there. The seams that are shown across here are very much exaggerated, as there is nothing there at all.

"Q. How about from the Violet seam up there till you get to the Rainbow vein?

"A. Well, on the east of the Violet seam about 20 feet, about station 843, there is a little bit of a seam in the side of the drift, dipping 78 degrees to the south. Aside from that there is nothing at all in the drift that goes through station 843 until we get over within a foot or two of the wall of the Rainbow lode, which passes through station 808.

* * *

"Q. Was any connection made on any vein or portion of a vein, from the Jersey Blue over to this discovery shaft of the Black Rock?

"A. No, sir; there was no vein between those points."

(All the work which the witnesses here refer to is new work, and has been done since the litigation commenced.)

Again, *Mr. Greene*, at page 144, referring to plaintiff's Exhibit 4, testifies:

"Q. The blue line which is shown crossing northwesterly and southwesterly through the Jersey Blue and the Black Rock, what does that represent?

"A. That line represents the approximate outcrop of the Jersey Blue vein."

Now, if we look to this blue line on Exhibit 4, it will be seen that if the contention as to the position of the Jersey Blue vein is correct, it must, on its course, pass to the south of all workings which had been done in the Black Rock claim up to the time the deed in question was executed. And the court, in its opinion (Tr., p. 49,) says:

"* * * In all the years subsequent to location of the Black Rock and until this litigation threatened, no workings from the discovery shaft were on the Jersey Blue."

Furthermore, *Mr. Greene,* referring to appellant's map, Exhibit 8, or "Tunnels' Level," testifies at page 151 as follows: That a drift was started from station 831 and a vein—Jersey Blue vein—was followed to the southeast; that the drift was driven to the Black Rock fault, "and we found the Jersey Blue vein cut off at that point, and immediately beyond the Black Rock fault we found the Rainbow lode."

And at pages 152-3, he testifies that in order to develop the Jersey Blue vein east and south of the Black Rock fault and beyond the Rainbow lode, a tunnel was driven by the Black Rock people at the request of appellees, known as the Clark tunnel; that this tunnel is some 24 or 25 feet higher than the Black Rock tunnel. * * *

> "About 65 feet from the mouth of that tunnel we encountered a northwest-southeast fault vein, but as we were quite sure that this was not the Jersey Blue the tunnel was continued to the southwest and at transit point 1058 a northwest-southeast fault vein with from 12 to 18 inches of quartz was found and was driven upon. * * * We could not follow it to the northwest for the reason that it was very close to the surface. * * * It was followed to the southeast far enough to show its direction. That is the vein shown at station 1058."

He states that in his judgment that is the same vein he referred to as the Jersey Blue from station 1072 to 1073.

(The work which the witness mentioned in the foregoing testimony is also work done since the litigation commenced.)

All of the other expert witnesses for appellees gave like testimony.

Now, according to this testimony the Jersey Blue vein, a short distance only beneath the surface, lies southerly of the development work herein above referred to as having been done in the Rainbow prior to the execution of the deed.

But one legitimate conclusion can be reached from the testimony and that is, that the chief features justifying the price paid was the Rainbow vein in the Black Rock claim; that the grantee must have understood that this was being conveyed to him, for it was the only thing of value within the claim, so far as the parties to the deed then knew.

This being the intention of the grantor and grantee, the deed must if possible be so interpreted as to give effect thereto, and to accomplish this it is only necessary that the court shall refrain from placing any restricted meaning upon the language found therein, namely, "together with * * * all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein."

In *Montana Mining Co.* vs. *St. Louis Mining Co., supra,* this court, at page 218, says:

> "* * * This secondary vein does not appear to have been known at the time of the compromise, and while, of course, there is always a possibility of such a vein being discovered, yet parties are more apt to contract and settle upon the basis of what they know than upon the possibilities of future discovery."

To permit the grantor to retain the consideration for his grant and at the same time to take from his grantee practically everything of value which his deed purported to convey, would not only defeat the manifest intention of the parties to the instrument, but would do violence to everyone's sense of justice.

(Some questions not specifically treated in the foregoing will be dealt with in a brief by associate counsel.)

We submit, *first:* That the Black Rock claim should be held to be prior in time and right to the Elm Orlu with result that appellant is entitled to a decree quieting its title to the Jersey Blue vein throughout its entire depth, including all ore bodies beneath the plane of union of said Jersey Blue vein with the Rainbow (this independently of the deed); *second:* even though this Honorable Court should reach the conclusion that the Elm Orlu claim has priority over the Black Rock and also the conclusion that the plaintiff, Clark-Montana Realty Company, and its said lessee, are not barred by the deed of the former to the extent of the fractional interest granted, still the decree appealed from should be reversed with directions to the trial court to enter a decree in favor of defendant quieting its title to said Jersey Blue vein throughout its entire depth, and also quieting its title to all ore bodies beneath the surface of said Black Rock claim easterly of a plane parallel to the west end line of said Elm Orlu drawn through a point on the northerly side line thereof 301 feet easterly of the southwest corner of the Black Rock claim, and this because, as the record discloses, there was an

utter failure of proof on the part of appellees to establish their contention that easterly of such plane there was found within the Elm Orlu claim the apex of any vein or the apex of any fork or branch of any vein which, on its downward course, united with either the said Jersey Blue vein or with that part or portion of the said Rainbow lode or vein the top or apex of which is conceded to be within the exterior boundaries of said Black Rock extended downward vertically; and also because there was an utter failure of proof on the part of appellees to establish their contention that easterly of said 301-foot plane there was found within the Elm Orlu claim the top or apex or any part of the top or apex of any vein or lode whatever.

Respectfully submitted,

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Service of the foregoing brief acknowledged and copies received this.....day of December, 1918.

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Solicitors for Appellees.

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In The

Supreme Court of the United States

OCTOBER TERM, 1918

Butte & Superior Copper Company, Limited, a Corporation,
(Defendant) Appellant

—vs—

Clark-Montana Realty Company, a Corporation, and Elm Orlu Mining Company, a Corporation,
(Plaintiffs) Appellees

ADDITIONAL BRIEF ON THE MERITS FOR APPELLANT, BUTTE & SUPERIOR COPPER COMPANY, LIMITED.

Statement of the Case.

This appeal is from a final decree of the Ninth Circuit Court of Appeals entered February 18, 1918, affirming a decree of the United States District Court in Montana, entered July 6, 1916, in favor of respondents (plaintiffs below, and hereafter so called), awarding plaintiff, Clark-Montana Realty Company, large ore bodies and vein areas beneath the surface of appellant's (defendant below, and hereafter so called) patented lode claims, together with injunctive relief, accounting and a money judgment for $177,704.40, with interest, as for ores extracted by defendant from the areas so awarded. (Rec-

ord, pp. 34-38.) All the lode claims in question are situate in the Butte district, Silver Bow County, Montana.

The action was begun July 23, 1914. Defendant by answer sought affirmative relief of a like character. Plaintiffs based their claims on its Elm Orlu (patented) lode claim. Defendant based its claim on its Black Rock and Jersey Blue (both patented) lode claims.

This case does not involve any controversy as to surface ground. The entire dispute is over ore bodies and vein areas at depth beneath the surface of defendant's claim, to which plaintiffs lay claim upon alleged extralateral right through the Rainbow vein apex, and a southerly branch thereof, called the Pyle Strand; and which defendant claims by virtue of the Rainbow apex and a northerly branch thereof called the Jersey Blue Vein.

Situs of Claims and Veins: The Elm Orlu lies south of the Black Rock and the Jersey Blue, being slightly separated from the latter by the Silver. Their relative location is shown on the diagram attached to plaintiffs' complaint. (Record, p. 12.) The Rainbow vein enters the Elm Orlu through the west end line and departs diagonally through the side line common to the Elm Orlu and Black Rock, into the latter claim. The distance along that line between the north and south wall of the Rainbow at its point or crossing is 111 feet. The intersection of its south wall and the common side line is called the 301 foot point, and the plane drawn vertically downward through that point parallel with the west end line of the Elm Orlu is called the 301 foot plane. The intersection of the north wall of the Rainbow and the common side line is called the 190 foot point, and its similar plane is called the 190 foot plane,—this to measure the distance of each point and plane from the southwest corner of the Black Rock.

The apex of the Jersey Blue vein passes eastward through the east end line of that claim, across the Admiral Dewey and the west end line of the Black Rock, to a point of union (as claimed by defendant), or intersection (as claimed by plaintiff), with the Rainbow eastward of the 301 foot plane. These two veins come together on dip westward, beginning from the

meeting on strike and deepening to the west. The plaintiffs claimed that the Jersey Blue vein was an independent cross vein, while defendant claimed it was a branch of the Rainbow.

The Pyle Strand was first found at depth,—not at the surface,—and in the 1200 foot workings of the Black Rock. Through it plaintiff laid claim to the ore bodies, beneath the Black Rock surface, at all points eastward of the 301 foot plane. It had not been continuously traced from such ore bodies up to its apex or top, nor the reverse; though it was conceded that it had been traced upward (by a raise, drift and raise), from such ore bodies to a point approximately 450 feet below the surface, where **(at that point only)** it was in the Elm Orlu territory. Its further course toward the surface was in dispute, plaintiffs claiming that its apex was in the Elm Orlu, and the defendant claiming it was in the Black Rock.

The foregoing features of split or branch veins, union on strike or on dip, and diagonal side-line-apex crossing, each and all necessarily involve priority of right as between the Elm Orlu on the one hand, and defendant's claims on the other. Other features involve continuity of vein from ore bodies to apex.

The following facts affecting priority were either admitted by the pleadings or on the trial, or were found by the trial court.

Patent History. There was a conflict of surface between the Black Rock and the Elm Orlu as marked on the ground at the time of the Black Rock application for patent, filed June 24, 1880. (Book of Exhibits p. 100.) The area in conflict is shown by the dotted line on the diagram. (Record, p. 12.) That application included all surface within the Black Rock boundaries. The Elm Orlu failed to file an adverse claim. Thereby that surface became adjudged to and was patented to the Black Rock. The Black Rock final entry was made and receiver's receipt secured on November 24, 1880, and its patent was received February 15, 1882. (Book of Exhibits, pp. 97, 115.)

The Elm Orlu application for patent was not filed until September 30, 1882, (Book of Exhibits p. 15) and covered only

the surface remaining after excluding that lost to the Black Rock. In the application that surface was described and tied to the Black Rock patent survey, which was also used as the initial point. The final entry was made and receiver's receipt secured for the Elm Orlu on December 30, 1882, and its patent was received on January 31, 1884. (Record, p. 5, par. **XII.**)

The history of the Jersey Blue patent proceedings corresponds in its relation to the Elm Orlu with that of the Black Rock. (Book of Exhibits, pp. **125, 133)** It thus appears that the Jersey Blue and the Black Rock were the earlier, and the Elm Orlu was the junior patented claim.

The Elm Orlu application for patent was based solely on an attempted earlier location, and not on any claim of holding or working under Section 2332, R. S. (Plaintiff's Brief in Circuit Court of Appeals, p. 30.) In so far as appears from the record, neither patent fixed the date of location.

Notices. The notice of location of each, the Elm Orlu and the Black Rock, was filed for record in 1875. The former on April 22d, and the latter on November 30th. A copy of each notice is attached to the complaint. (Record, pp. 10-12.) No amended or other notice was ever filed for the Elm Orlu. (Record, p. 434.) Its notice reads:

> "Elm Orlu.
> Summit Valley Mining District.
> "Deer Lodge County, M. T.
>
> "Notice is hereby given that M. McNamee, Chas. E. Savage and I. C. Burkett, have this 18th day of April, A. D. 1875, located the Elm Orlu Lode bearing gold, silver, and other metals under the provisions of the act of Congress of May, 10, 1872, situated in the mining district aforesaid and described as follows, to-wit: Beginning at the east line of the Poe Lode, thence running along the lode easterly fifteen hundred feet together with three hundred feet of surface ground on each side of the center of the vein and marked at each corner by stone mounds. The Discovery post is three hundred feet easterly from the beginning. The claimants adjoining are F. W. Barnard & Co. on the west and Anson Ford on the east.
>
> "C. E. Savage.

"Territory of Montana,
"County of Deer Lodge, ss:

"On the 19th day of April, A. D. 1875, personally appeared before me the undersigned, a Justice of the Peace in and for said County, Charles E. Savage, and made oath that he and M. McNamee and I. C. Burkett are of lawful age, citizens of the United States, and that the above notice is substantially a copy of the original notice of location of the claim above described, as posted thereon.

"ANSON FORD, J. P.

"Filed for Record April 22d, A. D. 1875, at 8 1-4 o'clock P. M.

"H. S. Clark, County Recorder."

At that time a statute of Montana (Laws Extra Session, 1873, p. 83), declared:

> "Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnibar, lead, tin, copper, or other valuable deposits, shall within twenty days thereafter, make and file for record in the office of recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States."

The only oath accompanying either notice wholly failed to verify or even refer to any fact stated in either notice.

Acts in Attempted Location. In their complaint, plaintiffs alleged that:

> "sometime subsequent to November 1st, 1875, * * * the predecessors in interest of the defendant **located the Black Rock Claim** and filed in the office of the county recorder of the county in which said claim **was located,** a declaratory statement in writing, a copy of which is hereto attached and marked Exhibit B." (Record, p. 6.)

This averment was not denied by defendant. Exhibit "B" shows the date of the filing to have been November 13, 1875, and the exact date of location stated therein was Novem-

ber 6, 1875. (Record, p. 11.) **One** of the **locators**, and patentees, W. A. Clark, a witness for plaintiffs, fixes the **time** of location as in 1875. (Record, p. 434.) Plaintiff's witness Warren says the same, and further that his partner, Belk, who died before the trial of this action, had located it, had made a discovery in the fall of 1875, and that this then locator and claimant, Belk, at that time asked him to "go over with him and see the Black Rock claim that he **had located.**" (Record pp. 109-111). Plaintiffs themselves also put in evidence an exemplified copy of the record of the land office proceedings in connection with the application for, and the patenting of, the Black Rock, which proceedings showed as a part of such application its notice of location in form like Exhibit "B" to the complaint.

The complaint alleged in detail the discovery, the marking of the boundaries and the record of the Elm Orlu as made, respectively, on April 18, and 22, 1880. (Paragraphs IV-VII, Record, pp. 3-4.) These allegations were wholly denied by the answer save as to the making of the record. (Paragraphs III-VI, Record, p. 15.) Of the seven witnesses called by plaintiffs to testify on that issue but two, W. J. Parks and Charles Warren, claimed to have seen the Elm Orlu as early as 1875. Parks, who was 76 years old, says he became acquainted with it "about 1875 I think." (Record, p. 86.) "I saw a discovery there and a mine staked out. **** I saw the stakes and this hole" *** (p. 87.) "There was a stake put down and a lot of stone, a monument of stone built up around it."

> "Q. Where were they?
> "A. On the corner. (p. 88.)

He also described the discovery hole as 12, 13, or 14 feet deep, and said:

> "There was a vein of some kind of ore, a kind of black manganese, we call it here." (p. 87.)

The foregoing was all of his direct testimony, save that he was prospecting and looking around when he saw it.

In cross examination he said he might have been hunting

for grouse, he was not sure. Asked: "Was it in the fall that you visited the Elm Orlu in 1875, or do you remember? Tell us the date." He answered: "Oh, **I don't remember**; it was **perhaps** along some time in the summer." (p. 89.) Again asked: "You are only estimating in a way about when it was that you first saw the Elm Orlu," he answered: "Well, I am pretty confident it was **along in '75** or **'76**; I am pretty sure it was **'75**." (p. 90.)

> "Q. But you wouldn't attempt to fix the date any more definitely than that you are pretty sure it was in '75 or '76, would you?
> "Yes, I **think** '75."

And again:

> "I didn't say I walked around the four corners of that claim at that time." [1875.]
> "Q. Now was that done later again in '75 and you walked around the four corners of the claim?
> "A. Yes, sir.
> "Q. What time in '75 was that?
> "A. That was in '76 I think when I was working on it, when I was representing it. ***
> "Q. The time that you saw the corner posts upon the ground was in '76?
> "A. Yes, the time I noticed them, yes.
> "Q. First time you noticed them?
> "A. Yes.
> (P. 91.)

On re-direct examination he is asked:

> "Q. Mr. Parks, to make clear one question with reference to your trip up there in '75, did you see the posts of the claim at that time, or any of them? (p. 91.)
> "A. Yes, I saw some of them, saw that it was a location and staked off.
> "Q. That was in 1875?
> "A. That was in '75 I saw some stakes there, yes sir."
> (P. 92.)

On re-cross examination:

> "Q. Mr. Parks, what posts did you see upon the occasion of your first visit there?

"A. Well I saw the two on the west end, the north and south, I remember it was when I come up, come west and I saw the two posts standing there.

"Q. You just saw the two posts up on the west end?

"A. Yes, that was the first.

"Q. **First time?**

"A. **Yes.**

"Q. How many posts were there on the west end of the Elm Orlu?

"A. **Only two.**

"Q. You are sure of that?

"A. That is all I saw. I think **that is all** I looked for; that is all they generally put up.

"Q. That is **all you remember now that you saw?**

"A. **At that time, yes.**

"Q. The Poser had been located prior to that time, you stated?

"A. I didn't notice that if it was.

"Q. Didn't you state that the Poser was the claim adjoining the Elm Orlu on the west at that time?

"A. It might be. It might have been located then.

"Q. **Might it be the Poser posts that you saw?**

"A. **It might have been,** yes, sir." (p. 92.)

Again examined in re-direct he says that he went around to the posts again in 1877 or 1878 and he thinks the posts that he saw on the west end in 1877 or 1878 were the **same** as he had seen in 1875. (P. 92.) The first **markings** that he saw on any stakes was when he went around to the corners in 1876. (P. 93.)

A deposition of the same witness, previously taken, was also read, in which he did not refer to either a vein or ores or stakes. (Rec. pp. 93-100.) The record notice declared the markings were **"stone mounds"** (Record, p. 10.)

Warren saw the ground for the first time five days **after** the location of the Black Rock. He saw a twelve foot hole and some rock, the nature of which, however, he could not describe. (Record, pp. 109-111). He was there after that in later years. At some time—year not fixed—he saw a N. E. corner stake. (Record, pp. 111, 112.)

The trial court filed both findings of fact, conclusions therefrom, and an opinion. (Record, pp. 39-61.) In the find-

ings of fact it did not refer to the above issue. (Record, p. 33.) In the opinion it said:

> "At least in 1876 a vein had been discovered and the corners staked." (Record, p. 40.)

Holding and Working. The plaintiffs specially alleged in their complaint a holding and continuous working of the Elm Orlu with exclusive possession and occupancy thereof for more than five years next after April 18, 1880. (Par. VIII, Record, p. 4.) This was denied by the answer. (Record, p. 17).

Neither of plaintiffs' 1875 witnesses claimed to have seen anyone, or that anyone was then working or occupying the Elm Orlu. The first work proven was the annual representation in 1876. Plaintiffs have not claimed (otherwise than in their complaint) that there was in fact any working or mining, other than representation work, before 1878. (Their brief, Circuit Court of Appeals, p. 32.) The Black Rock patent application was filed June 24th, and the final entry made November 24, 1880.

The court without referring to it in the findings, in its opinion said:

> "And that thereafter (1876) annual labor was continuously performed, the claim leased and ore mined," etc. (Record, p. 40) * * * * "In the matter of plaintiffs' contention that the Elm Orlu is the holder for the additional reason that it was exclusively possessed and worked for the local period of limitations for the recovery of real property, prior to the Black Rock patent entry, and secured thereby, the equivalent of a valid location, **the evidence is not sufficiently clear and definite to prove it.** (Record p. 43.)

Knowledge. There was no allegation in either the complaint or the reply of any **knowledge** by any Black Rock locator, at or before it was located, of any discovery or marking of, or of any claim to the Elm Orlu. Over the objection of defendant, however, and upon statement by plaintiffs' counsel that it was offered merely to prove discovery and marking of the Elm Orlu before the location of the Black Rock, as well

as a holding and working under Section 2332 R. S., to carry Elm Orlu rights back of the Black Rock location, (Record pp. 86-87), plaintiffs' witness Warren, spoke of visiting the Elm Orlu ground with a Black Rock locator—(only, however, **after** the location of the Black Rock). A record of an adjoining location, tied to the Elm Orlu claim and filed in 1875, was also introduced over defendant's objection, as well as general testimony that the Elm Orlu was a well known claim in 1875, and later,—no date in 1875 being fixed.

Afterward a contention was made by plaintiffs that such testimony evidenced a knowledge on the part of the Black Rock locators of the existence of the Elm Orlu claim and that such knowledge forbade them from urging invalidity of the latter's notice of location. The District Court in its opinion said:

> "That at least in **1876** a vein had been discovered... .....and it, (the Elm Orlu claim) was well known and to the knowledge of the owners of the Black Rock **thenceforward.**" (Record p. 40.)

There was no evidence that before November 7th or 13th, 1875, (the dates respectively of the marking of boundaries and of filing the record of the Black Rock), there was in fact a complete marking of boundaries of the Elm Orlu; nor any evidence that if there had been such a marking, any Black Rock locator knew anything about it. The complaint and its exhibit B shows partial surface conflict between the Black Rock and the Elm Orlu, lost by the latter in 1880. One of the Black Rock locators and patentees was W. A. Clark, whose Montana realty-holding-company is a plaintiff, and the owner of the Elm Orlu. As a witness for his own company he said that the first knowledge he had of the Elm Orlu was in 1876. (Record p. 130). He had nothing to say as to the knowledge of his co-locators, who were two other Clarks and one Belk.

Findings and Decree. The District Court found that the Elm Orlu was prior **in location,** (Record p. 33), and decreed it superior in mining rights as follows:

> "III. The Elm Orlu lode mining claim was located

prior to the location of any of said claims of the defendant, and is senior in date of location, and superior in mining rights accruing by reason thereof over any and all of said mining claims of the defendant." (Record p. 35).

On that finding it awarded the plaintiff the Rainbow vein to the 301 foot plane throughout its entire depth into and under defendant's claims. It also rendered a money judgment as above. (Record p. 33, Finding 1, 2, Conclusion 1; p. 35).

The trial court made only eight fact findings, so-called as follows: (Record p. 33)

(1) That the Elm Orlu claim was located before the Blackrock claim was located.

(2) That the north wall of the Rainbow vein apex crosses the common side line between said claims—190 feet from the south west corner of the Blackrock claim, and that the south wall of said vein apex so crosses—301 feet from said corner.

(3) That the Pyle Strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu claim.

(4) That the Jersey Blue vein apexes in the Blackrock claim, does not unite with the Rainbow vein, and crosses on strike and dip the Rainbow vein, on strike east of the Rainbow apex crossing of the common side line.

(5) That the Creden vein diverges from the north side of the Rainbow vein in the Elm Orlu claim, and has its apex in both the Elm Orlu and Blackrock claims.

(6) That the apex of the easterly strand of the Rainbow vein in Blackrock claim, terminates at a point within said claim east of the Elm Orlu east end line projected about—250—feet west of the Blackrock east end line.

(7) That prior to the Blackrock location and patent entry, both the Rainbow vein and the Jersey Blue vein at their apices were discovered and known within the Blackrock claim and at their apices appeared as a continuous east-west vein.

(8) That each party has mined the ore bodies of the other in the claims involved.

From these findings it made six conclusions, and, declared its written opinion, so filed, a part of those conclusions.

It is unnecessary to consider any question affecting the Creden vein because its rights are so involved in the general question of priority, that, if the decree shall be reversed on that ground, defendant will become entitled to some rights in the Creden vein, left undetermined by the trial court and not determinable from the record.

The Deed. The defendant affirmatively pleaded that the plaintiff, Clark-Montana Realty Company, now and at the time an owner of the Elm Orlu, had sold an undivided one-fourth interest in the Black Rock "together with all minerals therein contained and all veins, lodes and ledges therein," (Record p. 22. Par. XVIII), to the predecessors of defendant, in 1906. A copy of the deed was attached to the answer. (Record pp. 22-27). It read:

> "Together with.....all the **metals, ores,** gold, silver and metal bearing quartz, rock and earth therein, etc." (Italics ours.)

This allegation was not denied by plaintiffs. It was stipulated on trial that the consideration paid for that fourth interest was a quarter of a million dollars. Down to that time the only substantial development had been upon the main Rainbow vein and in or near the areas now claimed by plaintiffs. (Record p. 63).

The trial court made no finding on that feature, ignoring it in the decree. In the opinion filed, it distinguished this deed from the deed before this court in **Montana Mining Co. vs. St. Louis Mining & Milling Co.**, 204 U. S. 204, because of the specific words in the latter deed, "together with all the minerals therein contained;" and because the latter deed conveyed a definite fraction to settle pending litigation. (Record p. 90).

The Jersey Blue. The trial court made no finding of fact on priority as between the Elm Orlu on the one hand and the Jersey Blue, Admiral Dewey and Silver claims on the other, though in the decree it awarded the Elm Orlu priority on mining rights against all of them. (Record pp. 33-37).

Consequences of Plaintiffs' Contentions. The thing itself that Senator Clark helped to locate, and that alone gave value to the ground located, in which ground, and in the metals, earth, rock, and ores contained therein, his Montana realty-holding company sold to defendant's predecessors a fourth interest for a quarter of a million dollars, was the "Rainbow lode" (vein) and its branches. It was that "lode" or vein that he says he first visited in January, 1873, (Record p. 130) and that "lode" was the big outcrop at that time in that section of the country.

If the contentions here made, by his realty company plaintiff shall prevail, that company will, through its neighboring claim (Elm Orlu), which it wholly owned sixty days before it sold Black Rock interests to us, and which it now wholly owns,—for the half interest in the Elm Orlu deeded by the Senator's company to his son in August, 1906, was later redeeded by his son to his company,—take away from defendant not only that fourth interest but everything of value between the end line planes of the Elm Orlu underneath Black Rock surface, as well to the westward as the eastward of the 301 foot plane in the ground sold us.

This will be so, too, in spite of the fact that defendant's patents were prior in time, and the further fact that when in 1906 the Black Rock was bought from the Senator's company and others, the decisions of the Supreme Court of Montana would have led any lawyer examining that title to say that the Black Rock and the Jersey Blue were both superior in mining right to the Elm Orlu. These considerations demand a most thorough examination of the plaintiffs' contentions.

Plaintiffs in this court have challenged its jurisdiction to entertain this appeal. That question has been fully argued in printed briefs already on file.

Specification of Errors Relied Upon

Forty-two assignments of error were filed on this appeal. (Record pp. 922-930). The decree appealed from is alleged to be erroneous in the following particulars, presented by assignments of error, respectively as follows:

1. Error in not awarding priority of mining right and the disputed ore bodies and vein areas beneath its surface to the Black Rock claim.

(Assignments: II, III, IV, V, X, XV, XVII, XIX, XXII, XXIII, XXV, XXVI, XXVII, XXVIII, XXXII, XXXIII, XXXIV, XXXVI, XXXVIII, XXXXI, XXXXXII. Record pp. 922-930.)

2. Error in not awarding priority of mining right and the disputed ore bodies and vein areas beneath its surface to the Jersey Blue claim.

(Assignments: XV, XVII, XVIII, XXII, XXIV, XXV, XXVI, XXVII, XXXX, XXXXII. Record pp. 924-930).

3. Error in not awarding defendant a final decree for all ore bodies and vein areas beneath the Black Rock east of the 301 foot plane.

(Assignments: XXI, XXIII, XXVII, XXXI, Record pp. 925-927).

4. Error in not recognizing the grant of the undivided fourth interest in ores, rock, earth, etc. beneath the Black Rock surface evidenced by the Clark-Montana Realty Company deed, October, 1906.

(Assignments: XXIX, XXX, XXXI, Record pp. 926-927).

Because we have nothing to add to the argument in the main brief on the questions presented by specifications numbered three and four above, we shall confine this argument to specifications numbered one and two.

Argument.

Jurisdiction of this Court.

Relying upon our brief on file in opposition to the motion to dismiss this appeal, we merely add that in **Reavis** vs. **Fianza**, 215 U. S. 16, 24, 25, this court interpreted a section (45) of the Philippines Act closely resembling Section 2332 R. S., as adopting the local law concerning adverse possession only in respect to the **period** and not as to the **quality** of that possession, but expressly **reserved** the question as to Section 2332 itself. In **Calhoun Gold Mining Co.** vs. **Ajax Gold Mining Co.**, 182 U. S. 409, 505, this court said:

> "At any rate a federal statute has more than a local meaning and **until construed by this court,** cannot be said to have an established meaning."

The question thus involved in the **Reavis** case is presented (among others involving interpretations of Section **2332, R.** S.), on the face of plaintiff's complaint in this action by its plea of "holding and working" in paragraph VIII (Record, p. 4). What the words "held and worked" involve and require, was a real controversy in this case before, and even after the trial court had found against the plaintiffs on that fact issue. This court itself is our authority for the assertion that Section 2332 R. S. has never been interpreted as to that feature by this court. It constitutes a clean-cut federal question additional to those detailed in our brief in opposition **(United States** vs. **Patten,** 226 U. S. 525, 535). Indeed this court so holds as to the similar provision of the Philippines Act, in the **Reavis** case, **supra** (215 U. S. 21, 22).

The Merits.

I.

THE BLACK ROCK IS PRIOR TO THE ELM ORLU IN MINING RIGHTS.

If so prior, there must be awarded to the Black Rock as against the Pyle or any other strand, all of the Rainbow vein east of the 190 foot plane, and everything in all spaces of intersections of veins and in united veins, below points of union and to the west of that plane; and this decree must in that and in other respects be set aside.

1. **This court will make its own determination of priority.**

The trial court declared facts—some in findings (so-called), and some in its conclusions—including in the latter its opinion as filed. Wherever found, if they be inherently findings of fact, this court will treat them as such.

Eilers v. **Boatman**, 111 U. S. 356, 357.

In challenging the trial court's finding of priority of location, and superiority of mining rights for the Elm Orlu, we are not unmindful of the rule that a finding of fact by a trial court will not be disturbed in this court if there is any substantial evidence to support it. But that rule has no application, when, as in this case, the evidence on which priority must depend is uncontradicted. Under such circumstances, if the law demands a different conclusion, the conclusion of the trial court is unsupported by the evidence, and this court will declare the proper result.

United States v. **Clark**, 96 U. S. 37, 40.
Collier v. **United States**, 173 U. S. 79.

2. **Elementary Principles.**

As a basis for our argument we announce several principles which we believe will not be disputed even by plaintiffs. They are:

(a) The claim having superior rights takes to the point of last departure on veins departing through a

common side line; and takes all below union, in branch or other veins apexing one in each claim and uniting at depth.

St. Louis M. & M. Co. v. **Mont. M. Co.,** 104 Fed. 664.

2 Lindley on Mines (3d Ed.)—sec. 614.

Section 2336 R. S.

(b) Such mining rights can only be acquired by segregation from the public domain through valid location actually made or conclusively presumed.

Belk v. **Meagher,** 104 U. S. 279.

Del Monte M. & M. Co. v. **Last Chance M. & M.,** 171, U. S. 77.

(c) To an actual valid location, when the local statute requires a record, three steps are necessary, viz.:— discovery, marking of boundaries and a sufficient record.

Belk v. **Meagher,** 104 U. S. 279.

Del Monte M. & M. Co. v. **Last Chance M. & M. Co.** 171 U. S. 77.

(d) This court has held the order of these steps to be immaterial; but that until the last is actually taken the location is not complete, and no grant from the government has been gained.

Creede & Cripple Creek M. & M. Co. v. **Uintah Tunnel M. & T. Co.,** 196 U. S. 337, 354.

(e) An entry sustained by a patent, is **conclusive evidence** that there had been **at the time** of the entry, a valid location.

Creede, etc. v. **Uintah,** etc. 196. U. S. 337, 353, 354.
Last Chance M. Co. v. **Tyler M. Co.** 61 Fed. 557.

We now pass to the disputed questions.

3. The patent and entry do not conclusively evidence the length of time before the entry that such location existed. The time when it was made is an open question of fact, provable like any other.

(a) Effect of the entry and patent.

The principle just announced is believed to represent the rule to be deduced from the "Creede" case, above; from the limitation therein by this court of its own previous general expression in the "Ajax" case (Calhoun Gold Mining Co. v. Ajax Gold Mining Co. 182 U. S. 499), which limitation applies also to the "McKnight" case, (El Paso Brick Co. v. McKnight, 233 U. S. 250), and from an analysis of the "Lawson" case, (Lawson v. U. S. Mining Co., 207 U. S. 1).

Reserving that analysis, we content ourselves for the moment with the "Creede" case, in which the issue was tendered by answer as to the date of discovery of a patented lode claim; that averment stricken out by the trial court; the latter ruling reversed by the Court of Appeals, whose action was affirmed by this court. Against the contention that the question was concluded by the locators patent, this court said:

> "Are other parties concluded by the locator's unverified assertion of the date, or the acceptance by the government of his assertion as sufficient, with other matters, to justify the issue of a patent. Undoubtedly so far as the question of time is essential to the (patent) right the patent is conclusive. But is it beyond that?" (345)....."An entry sustained by patent is conclusive evidence that at the time of the entry there had been a valid location," etc..... "If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights anterior to the entry and dependent upon that order show as a matter of fact what it was?" (353-354) ....."If the defendant was not estopped by a failure to institute adverse proceedings, then the trial court erred in striking out parts of the answer in reference to the date of plaintiff's discovery," etc. (360).

The entry and patent are accorded such an effect to protect the latter against claims arising and acts done between the entry and its issue, and to prevent inquiry into the existence of facts warranting its issue. Could the patent be issued at the very moment of entry it would sufficiently protect itself.

With the reason for protection the rule of protection should cease.

In view of the disagreement as to what the above cases do decide, we feel at liberty to present views as if the question were res intiger, in the hope they may somewhat assist this court in arriving at the underlying principles, the application of which, while harmonizing its previous decisions, shall set the whole matter at rest. Summarized, we believe:

(1) The patent right is a separate and later right superior to its precedent location right.

(2) Like the location right, it is gained by compliance with certain requirements of law, which may be called patent entry proceedings. These proceedings begin by an application, and after intermediate steps, result in payment for the land and the issue of a receiver's receipt.

(3) The latter act, commonly termed "entry", passes full, equitable title. The after-patent passes the legal title.

(4) The entry may be viewed as a decision of title and the patent as an entered decree. They adjudicate whatever must have been and whatever was in fact determined in the patent proceedings. They adjudicate no more.

(5) Surface ownership is final and forever determined by these proceedings against all claims pre-existing, as well as subsequent. The former are barred by failure to adverse. The latter are cut off by the conclusive effect given the entry and patent.

(6) The effect thus given as to surface belongs also to rights so related to the surface as to be inseparable therefrom and not subject to claims originating outside that surface. Such rights are:

(a) To the earth, country rock, loose ores and metals within and beneath the surface boundaries.

(b) To vein areas, and ores therein of veins whose apices pass through both end lines at all points within and beneath the surface, down to points of union or intersection, with branches or other veins apexing without such boundaries.

As to these the entry determines them, and it and

the patent are as conclusive evidence as in the case of the surface.

(7) As to the remaining mining rights, viz:

(a) Vein areas, and ores therein, between planes drawn through their foot and hanging wall respectively, at side line intersection on diagonal apex crossing thereof, whether such vein passes through end and side line, or both side lines, or through both side lines of one claim and a side line and end line of the adjoining claim, and

(b) Veins, and the ores therein, within spaces of intersection or below points of union with branches or other veins apexing in other surface.

These rights, not only within the patented surface but such as pass outward in downward course from beneath such surface, may all belong either to the patentee or a locator or patentee of other surface.

(8) The latter rights—which we will call "Group 2" rights, as against the former, "Group 1",—need not be presented by adverse claim in the patent proceedings unless there be conflict of surface between the two claims. If in the latter case the question as to conflict depends solely on priority of location and not upon dealings between the parties failure to adverse may result in an adjudication of priority, as would be the case if adverse had been filed and carried to judgment, in which event "Group 2" rights depending on priority might be conclusively adjudicated by the patent proceedings. In the case of non-conflicting surface, there is neither duty nor right to adverse, and so no determination of these rights through the patent proceedings, which as to non-conflicting surface would only cut off those initiated after entry.

(9) As to pre-existing claims through non-conflicting surface affecting "Group 2" rights, they must prevail or fail according to the same principles after patent to both or either location, as before patent to either, and the issue must be tried in the very same way.

(10) Upon such issue, first in time first in right, is the controlling principle. The outside right through non-conflicting location preceeding the patent may be shown against it and the patentee in turn to prevail against the former claim, may show his inside prior location right.

(11) In such cases neither owner may inquire into

the discovery or markings of the other's location for the purpose of overturning or lessening any "Group 1" right, or any right in "Group 2" founded on conflict of surface, and concluded by either failure to adverse or judgment upon adverse, but only for the purpose of determining the date or priority as affecting "Group 2" rights undetermined by the patent.

(12) In such inquiry the burden of proof always rests upon the owner whose asserted claim is to something within or beneath the other's surface. This is true regardless of whether the person asserting the claim from the outside is a holder by patent or by location. In the absence of proof the presumption on every issue, geological as well as any other, material to the determination of the right claimed, is always in favor of the owner of the surface within or beneath which the disputed areas or materials lie.

(13) If the pre-existing location sought to be proven for anti-patent priority was invalid when made, it can have no aid upon that issue from the later patent. It will be wholly unavailing unless it was curable and in fact cured before the adversary right arose.

In the "Creede" case this court said:

"One not a party to proceedings between the government and patentee is concluded by the action of the government only in so far as that action involves a determination." (354) "E converso he is not concluded by matters not necessarily or in fact determined in the patent proceedings."

As between those asserting prior rights under "Group 2" and unadjudicated, the question becomes one of naked fact, just as it would have been before the patent entry.

Creede & Cripple Creek Mining Co. v. **Uintah Tunnel M. & T. Co.** 196 U. S. 353, 354.

Last Chance M. Co. v. **Tyler M. Co.** 61 Fed. 565, 566.

Hickey v. **Anaconda Copper Mining Co.** 33 Mont. 46.

To hold otherwise would work great injustice. For exam-

ple:—A makes an invalid location. B, thirty days later, makes a valid location immediately adjoining A without conflict of surface. A first applies for patent ten years later; shows a five year holding and working (under Section 2332, R. S.), next before his application; and gets his patent. If it be held that the patent has validated A's defective location, then B has had a priority created against him out of acts done and proceedings initiated subsequent to his own right, which priority may take away both veins and ore bodies at intersections and below unions that had become his upon his first valid location, and that would have been his forever if he had outstripped his opponent and first applied for patent. Whereas, if A that would have been his forever if he had outstripped his opponent and first applied for patent. Whereas, if A and B never applied for patent, or if A abandoned his occupancy, then the right to the ores and veins in question must always have been with B, because he acquired priority before A's application for patent, and because there being no surface conflict, B could not adverse A's application. Such a result would seem to deprive B of valuable property rights without due process of law.

A right of possession secured by a valid location is a right of property which may be taxed, inherited, sold, mortgaged, and seized under attachment or execution. **Forbes** v. **Gracey,** 94 U. S. 762; **Gwillim** v. **Donnellan,** 115 U. S. 45; **Clipper M. Co.** v. **Eli M. Co.,** 194 U. S. 220. Once vested it cannot be lost save by abandonment, forfeiture or judicial process. It is impossible to narrow, impair or destroy it by the after action of another in seeking patent to independent surface ground.

> **Hickey** v. **Anaconda Copper Mining Co.,** 33 Mont. 46.
>
> **Last Chance Mining Co.** v. **Tyler Mining Co.,** 61 Fed. 565, 566.

So it is that a patent may not be used to create a false priority wherewith to destroy pre-existing rights of others, of the group "2" class.

(b) Proofs and presumptions in case of alleged prior mining rights.

Proofs: The one who first completes a valid location, gains the first segregation and first mining right.

In the "Creede" case this court quoted from the opinion of Mr. Justice Field in **St. Louis Smelting & Refining Co.** v. **Kemp,** 104 U. S. 649, as follows:

> "A mining claim is a parcel of ground containing precious metals in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules." (347)

The court itself continues:

> "Doubtless a locator does not acquire the right of exclusive possession until he has made a valid location. It must be remembered that discovery and the markings on the ground are not matters of record, but **in pais,** and, if disputed in an adverse suit or otherwise, must be shown, as other like facts, by parol testimony."

It would be idle to prove an **invalid** location. Such a location would not gain a grant from the United States anterior to its patent entry. Without anterior grant there would be nothing to protect or go back to. While you may protect a pre-existing right by proof you may not, as against intervening parties, create the former by relation.

While a locator may relate to his discovery, he may not so relate as against intervening rights to the same surface or rights appurtenant to adjoining free surface, location of which was first completed, unless he completed his own location within the time provided by law. In the "Creede" case this court quoted approvingly from **Cedar Canyon C. M. Co.** v. **Yarwood,** 27 Wash. 271, as follows:

> "In the absence of intervening rights . . . . . his possessory rights under his location are complete from the date of such discovery." (350).

This principle protects one who is proceeding diligently according to law, but if he depart from the law or if he fails to proceed diligently, another who initiates and perfects a location in the interval will acquire a superior right.

Presumptions: (a) In considering presumptions we must sharply distinguish between the **doing** of an act and the **date** when that act was done. Mr. Lindley recognized this distinction in these words: "The **fact** and **date** of discovery" etc., in Section 783, Volume 3, page 1920, Third Edition of his work on Mines. So likewise do plaintiffs in this action. For while in their complaint they allege, and thus admit, the **fact** that we made a location of the Black Rock, they do not directly admit the **date** thereof, save as being "sometime subsequent to November 1, 1875." (Record p. 6).

We are not here concerned with the fact of either discovery or marking, save as those facts may be involved in the effort to arrive at the date at which each act was done. That there was discovery and that the boundaries of the Elm Orlu were completely marked in 1876, and thereafter, was found by the trial court, and we accept that finding and its consequences. But we shall presently show our discovery and marking and location were admittedly made and in fact made in 1875. Therefore, we now stress these features:

(1) That as to the **date** or **time when** the marking was completed there can be no aider by presumption.

(2) There is no absolute finding of the trial court back of 1876.

(3) There is no affirmative evidence upon which this court could find an earlier date for the Elm Orlu than that fixed by the trial court.

(b) A dominant presumption always obtains in favor of the owner of the surface, whether locator or patentee, against other locators or patentees seeking to take vein areas or ores therein beneath the surface of the former. This court has invariably declared and applied that rule and it must not be for a moment forgotten in the consideration of this case.

In **Del Monte M & M. Co.** v. **Last Chance M. & M. Co.**, 171 U. S. 55, 66, the court said:

> "They (courts) cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neigh-

> bor and appropriate it to his own use . . . . . Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions or else be content with simply the mineral beneath the surface of his territory."

In **Montana M. Co. v. St. Louis M & M. Co.**, 194 U. S. 235, 239, this court approvingly cited decisions of the Supreme Court of Montana and of other states to the point that the common law presumption of ownership beneath the surface would attach in favor of the owner of the mine until it was shown that the vein had its outcrop in the surface of another; and quoted Judge Hawley as follows:

> "Hands off of anything and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

See, also **Mammoth Mining Co. v. Grand Central Mining Co.** 213 U. S. 72.

In the case at bar, the date of the prior right claimed by each, the plaintiffs and the defendant, is a vital factor in plaintiffs' extralateral claim, so that the above rule applies in fullest force. It demands that everything not proven shall be presumed against plaintiffs. Once we come to a clear recognition of this principle and its operation in favor of the defendant as the surface owner, the consequences, upon this record, seem fairly certain. Plaintiffs must prove their prior right or fail. To do so they must prove a valid location anterior to the Black Rock patent and location, for they have admitted the latter to be valid. We shall later undertake to show that upon the findings of the court such a result cannot properly be declared, and that, whether the location record of the Elen Orlu be valid or void, the Black Rock must be held prior in time.

A few cases, recognizing the difficulty which increases with lapse of years, of making actual proofs, have declared a prima facie presumption of a sufficient discovery in favor of very old claims arising from long years of mining with proof of record and marking of boundaries. It would seem in fairness

that such a presumption, if and when applicable, would extend to marking of boundaries or proof of actual discovery and recorder notice. But no court has declared the presumption in any case in which the recorded notice was void upon its face, or failed to comply with the requirements of law.

This court has never considered the question; though as to lode claims generally it has ruled that such step—discovery, marking and (if so required by state statutes) the record, must be expressly and affirmatively proven.

If recognized by this court the principle might be applied in the present case in favor of the Black Rock, both because its location is admitted by the plaintiffs and because it enjoys the benefit of the dominant common law presumption as the owner of the surface carrying the ores which the plaintiffs claim.

That presumption could not apply in favor of the plaintiffs as their Elm Orlu claim for three reasons:

(1) The court found the facts with respect to discovery and marking. That finding rejected both presumption and evidence.

(2) The Elm Orlu having affirmatively alleged the facts in that regard attempted to prove them. So that substituted proven facts for presumption.

(3) A presumption cannot flow from the record of an instrument whose record is not authorized by law. Such a record in the case of deed registration statutes has been described by this court as a "complete nullity".

(4) When the only step proven—the record—appears on its face to have been taken contrary to law, it cannot form any basis for a presumption that either of the other two steps were taken in accordance with law.

(5) The Elm Orlu as an unrelated claimant can have no aide by presumption to take ores from beneath the Black Rock or Jersey Blue surface.

The danger of presumption of fact is well illustrated in this case. Thirty-eight years ago when facts were fresh and readily provable, and when, if they had accepted the Black Rock challenge, the Elm Orlu owners would have been obliged to have affirmatively proven that they had marked their

boundaries and made a sufficient discovery before the location of the Black Rock, the latter claimed a considerable fraction of surface which the Elm Orlu in their complaint now say they "abandoned . . . . . about June 1st, 1882." This was the same month in which the Black Rock applied for patent, and the allegation should be construed as a declaration of the consequences of the failure of the Elm Orlu to adverse that application.

By such application the Black Rock people said to all the world "this whole area is ours. Dispute it in whole or in part, whoever will." The Elm Orlu refused the challenge and surrendered to the Black Rock claim by failing to adverse. If they were then unwilling, for what reason it matters not, to wage battle on that issue, should a court thirty-eight years later be asked to relieve them of a need for proof which they would not or could not meet at that time?

It must be borne in mind, too, that there had been no dealings between the parties or improvements by either on the fraction in question. So that there is no room to now assume that the fraction was yielded because of a grant, or upon any principle of estoppel or limitation.

The Record: As a step in perfecting location it needs and can have no benefit of presumption. A certified copy thereof proves itself. As a basis for presumption of the fact or date of either of the other two steps, unless it is made prima facie evidence by the state statute, it is unavailing. And even a presumption declared by statute would find itself opposed to the dominant presumption in favor of the owner of the surface in the case of the Elm Orlu. If this be true of a record filed in strict accord with every requirement of federal and state law, how much more must it be true of a paper, the filing of which is not authorized by law, and especially a paper, the fact statements in which, for what cause it matters not, are unverified.

If it concerned us we might suggest that any presumption as to the fact of discovery, or marking, so far as based on long years of holding and working, should be fixed at the end, or intermediate of, but certainly not before, the beginning

thereof, and any presumption as to the fact of discovery so far as based on proof of marking should not be at an earlier date than the proven completion of the marking. We insist, however, that neither presumption can be indulged in in aid of plaintiffs' claim to extralateral rights.

4.—Analysis of Cases Affecting Point 3.

The principles stated by us in subdivision "3" were declared by the Supreme Court of Montana (reaffirming other previous decisions of that court), before the purchase of the Black Rock from the plaintiff Realty Company, and on July 24, 1905, in **Hickey** v. **Anaconda Copper Mining Company,** 33 Mont. 46—itself approved and reaffirmed in **Washoe Copper Co.** v. **Junila,** 43 Mont. 178. Six months before the Hickey case was decided, this court had so declared the rule in **Creede & Cripple Creek M. & M. Co.** v. **Uintah Tunnel M. & T. Co.,** 196 U. S. 337. Neither before nor since the decision in the **"Creede"** case had, or has this court qualified or modified the views therein expressed.

As demonstrating that the decisions of this court are consistent with each other in this respect, and that all are consistent with the **Hickey** case, **supra,** we attach an analysis of the principal decisions as a schedule "A" to this brief. This analysis discloses, among other things, that the **"Ajax"** case **(Calhoun Gold Mining Co.** v. **Ajax Gold Mining Co.,** 182 U. S. 499) was decided in 1901,—opinion by Mr. Justice McKenna, who sat in each of the other cases,—and that in all of these cases the opinions were by a unanimous court; that the general language of the opinion in the **"Ajax"** case was urged in its broad reading upon this court by counsel in the **Creede** case; and that in the latter case this court rejected that reading and distinguished and limited the language so as to bring the **"Ajax"** case in direct harmony with our present position.

The **"Baker"** case **(Baker** v. **Butte City Water Co.,** 196 U. S. 119) was decided in January, 1905,—opinion by Mr. Justice Brewer, who also delivered the opinions in the **'Creede"** case, decided in January, 1905, and in the **"Lawson"** case **(Lawson** v. **United States Mining Co.,** 207 U. S. 1), decided in 1907. Neither Mr. Justice Brewer nor any of the other seven mem-

bers of this court who sat in both the last two named cases discovered any inconsistency between them. Indeed, Mr. Justice Brewer in the **Lawson** case quoted approvingly from his own previous opinion in the **Creede** case.

In the **"Lawson"** case the location notices availed of for earlier priority independent of patents, were notices made in 1863 and 1864, respectively, at which time there was no Congressional legislation regulating the disposition of the mining lands of the United States. There were, therefore, no such limitations upon either locators or officials; nor could the latter have held applicants to any specific conditions of location other than those prescribed by local regulations. It did not appear on the trial and it could not be proven what the nature of the regulations were. The notices themselves were in evidence. They had been accepted by the government officers who may have had a knowledge of the regulations at the time they considered them. There was no known requirement as to marking boundaries, and the discovery, being upon the broad lime-stone outcrop, and unchallenged, proved itself. Therefore, the locations in question were unique in that but a single step was required, rather than three,—and this step or these steps, i. e., record alone, or record and discovery, were established; nor was there any dispute as to the **date** or **time** when the acts were done.

On the other hand, in the opinion in the **Creede** case, Mr. Justice Brewer says that the action of the land officers only concludes as far back as the date of the initiation of the patent rights, and that the fact question there in dispute, viz: **date** of actual earlier location, was not concluded by the action of those officers, but was a matter for **independent proof.** The views of this court and of Mr. Justice Brewer in that regard are made more certain by the opinion delivered by the latter in **Hussman** vs. **Durham,** 165 U. S. 144, 148, as follows:

> "Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backwards than of the inception of the **equitable right."**

The "certificate of location"last named was one issued by the Land Office upon entries under land warrants.

This court has often referred to the right perfected by entry and payment for mineral land as a complete "equitable title", and the beginning of proceedings to procure that title is the application for patent.

The **"Baker"** case was approved and followed in 1912 in **Clason** v. **Matko,** 223 U. S. 646,—opinion by Mr. Justice McKenna.

In the "McKnight" case **(El Paso Brick Company** vs. **McKnight,** 233 U. S. 250, just as in the **"Ajax"** case, there were no **intervening** rights, and the case is to be distinguished in the same manner as was the **"Ajax"** in the **"Creede"** case.

We make no question of the principle so often declared by this court that the decision of the General Land Office upon a fact question within their jurisdiction is conclusive upon the parties. While we insist that the issue of priority at dates anterior to the initiation of patent proceedings is an open fact question, we do so because the issue involves the existence of a right additional to the patent right and additional to anything that the Land Department had power to pass upon. The inquiry as to the sufficiency of notices of location of the claims invites the determination of a question of law which appears upon the face of the patent proceedings themselves, and as to the questions of law the determination of the Land Department is not conclusive.

Shepley v. **Cowan,** 91 U. S. 330.

El Paso Brick Co. v. **McKnight,** 233 U. S. 250.

5. The actual notices of location were void and the Black Rock gained priority upon the constructively valid location born of its earlier patent.

That patent created a conclusively valid location as of date June 24, 1880.

(a) The validity and sufficiency of the previous location notices.

This presents a question of law, appearing on the face of the

record of the patent proceedings in each claim, and dependent upon the Act of Montana of 1873. Such a question will be determined by this court without regard to the action of the Land Department. The latter cannot convert a notice void in law into a valid notice by their assertion or action. Its validity depends on the effect of a state statute already interpreted by the courts of that state.

Extended argument is not necessary to demonstrate the invalidity of these notices. They are affected by the same infirmity — lack of verification — that caused the Supreme Court of Montana to hold invalid the notice before it, and the attempted location based thereon, in **Hickey** v. **Anaconda Copper Mining Co.,** 33 Mont. 46.

A later statute of Montana embracing requirements even more severe, was held constitutional and within the power of the State legislature (under implied authority from Congress), by this court in **Baker** v. **Butte City Water Company,** 196 U. S. 119. The claimant, whose location was otherwise regular, was not suffered to put in evidence a notice, not complying with the statutory requirement,—though in a respect other than as to verification; and thus lost the ground in dispute to a junior valid location. This court affirmed the judgment of the Supreme Court of Montana in that case on January 3, 1905, (nearly two years before the defendant's predecessors bought the Black Rock), thereby ruling that the Montana statute was mandatory.

Idaho also has a statute requiring verification of the declaratory statement which is to be recorded, and, like the Montana statute, not providing any forfeiture or penalty for failure to verify. The Supreme Court of Idaho, like that of Montana, has ruled that the requirement of an affidavit is a condition precedent and essential to validity of the notice and location.

Van Buren v. **McKinley,** 8 Idaho, 93.

For the states requiring verification, see **2 Lindley on Mines,** 3d Ed., Section 385. The territory of Alaska should be added.

Cloninger v. **Finlaison,** 230 Fed. 98.

In **Clason v. Makto,** 223 U. S. 646, this court unanimously affirmed a judgment awarding mining ground to a junior valid location against an earlier attempted location, because the notice of the latter lacked a statement required by the law of Arizona that it was a re-location of a forfeited claim. The **"Baker"** case was cited and approved upon the constitutionality of the statute. It is true the Arizona statute declared the consequences of failure to comply with its requirements, and the Montana statute before this court in the **"Baker"** case was silent as to consequences.

Despite the **"Baker"** case, plaintiffs have argued that for lack of any declaration of consequences of non-compliance in the statute itself, its directions are not obligatory. A first, and seemingly complete, answer to this contention is that the Montana legislature had the power to make such requirements obligatory; and the Supreme Court of Montana, in the **Hickey"** case and in many earlier cases, has read the language of that statute as imposing obligations. That interpretation of the state statute by the highest court of the state will be accepted by this court. Indeed, this court has ruled so with respect to the requirements of the later similar statute of Montana, which, likewise, does not contain any declaration of consequences.

Were the question an open one, however, the contention would be without merit. Such a declaration is unnecessary and useless. The state or territory, in prescribing these conditions, acts as the authorized agent of the United States and in right of a delegated power. If the principal owner of the land need not declare consequences, no more need the agent legislature.

The Act of Congress declares that:

> "All records of mining claims *** shall contain such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim." (Section 2324 R. S.)

It also requires discovery and marking of boundaries. No consequences of non-compliance with any of these requirements are expressly declared. In numerous mining cases,

claims have been lost for non-compliance; and yet we believe no case can be found in which it was ever seriously contended that consequences of non-compliance should have been declared by Congress. Such requirements are in no sense forfeiture provisions, as the trial court mistakenly assumed. They are conditions precedent to the acquisition of a right offered by the United States as the owner of the land, upon terms which it has the absolute right to prescribe. Compliance with those terms is essential to create the right. Non-compliance does not forfeit the right because none has vested or can vest until the conditions are met.

Of 14 States, plus Alaska, having similar legislation, one-half thereof, and Alaska, have consequences of non-compliance declared in the statute itself. The other half has not. Speaking of all without distinction, the author in **2 Lindley on Mines,** 3rd Edition, Section 384, says:

> "It follows from what we have heretofore said that any notice or certificate of location which is used as the basis of the record which fails to reasonably comply with the requirements of the Federal law as to the contents of such record, is ineffectual and void."

(b) **The requirement of the State statute being for a record of a verified notice, the record of this unverified notice was unauthorized and unavailing.**

The Montana statute requires the locator to:

> "Make and file for record *** a declaratory statement thereof, in writing, on oath."

There is no claim that the requirement was met by the Elm Orlu notice.

This court, in the **"Baker"** case, supra, held that statute constitutional and its requirements mandatory. In the above aspect the case is like those arising under deed record statutes requiring acknowledgment. Of them this court has held that the record of an unacknowledged instrument is "a mere nullity." In **Lynch** v. **Murphy,** 161 U. S. 247, the court quotes Mr. Pomeroy as follows:

> "The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. * * * If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or encumbrancers."

It also quotes Mr. Story to like effect, and itself concludes:

> "It follows that the recording of the instrument under consideration was a mere nullity in a jurisdiction * * * where particular formalities are required to authorize the recording."

In **Cloninger v. Finlaison,** 230 Federal, 98, decided in 1916, the Ninth Circuit Court of Appeals held, that under the laws of Alaska, an unverified certificate of location was not entitled to record, and invalidated the location. It is true that the Alaska statute provided that if the discoverer failed to comply with any of the stated requirements of the law, his right by reason of his discovery should cease; (230 Federal, 110) but after referring to the Alaska statute, that court cites as authorities the Montana case of **Washoe Copper Co., v. Junila,** 43 Mont. 178, and the Idaho case of **Van Buren** v.**McKinley,** 8 Idaho, 93, both of which are referred to in this brief. Is it not a fair inference that by referring to these decisions the Court of Appeals accepted the views of the Montana and Idaho courts to the effect that such requirements were mandatory, and that a failure to observe them invalidated locations, even though the statute did not expressly so declare. The precise point which we are now making would, however, be as strong without said citations. The point is that a certificate not conforming to the statute was held not entitled to record. Here, we note that in **Cloninger** v. **Finlaison,** the Circuit Court of Appeals took a view inconsistent with that expressed by it in this case.

The evident purpose of the statute was to put a check upon irresponsible action, and by liability to criminal penalty in case of false verification, to somewhat insure against fraud in

the location of mines. The verification was not a mere technical matter.

In **Mares** v. **Dillon,** 30 Mont. 117, the court said:

> "The object of recording the declaratory statement is to give the public notice that a location has been made, and the object of requiring an oath was to prevent fraud, by subjecting the locator to the penalties of perjury if he swore falsely and corruptly."

It follows that the sufficient record essential to a valid location and to segregation of mining rights never was made in the case of either of these two claims; that for want thereof, each attempted location was void; that the first segregation was through the conclusively presumed valid location born of the application for the Black Rock patent on June 24, 1880, and that priority of mining rights belongs to the Black Rock by virtue of its earlier patent, there being no anterior location right.

We next consider the situation as if these notices had been in compliance with the Montana statute.

7. Had both location notices been valid, nevertheless the Black Rock would have been the first completed location.

The Black Rock. Plaintiffs themselves allege the Black Rock was located some time after November 1, 1875 (Record, p. 4, Par. VII). Assuming the word "located" the same meaning wherever used in the paragraph, i. e. reading it most strongly against the pleaders, who are also the extralateral claimants, we find that they averred the claim **"was located"** when the notice was recorded. The notice attached as Exhibit "B" to their complaint shows filing date November 13, 1875. In addition, two of their witnesses fix the date of location as in 1875. Their witness Warren also testified in chief to a statement by Belk, since deceased, made forty-three years ago in the fall of 1875, while he was an owner, referring to "the Black Rock claim that he had located." (Record p. 109). It is therefore, a fact, alleged by plaintiffs, and affirma-

tively proven, that the Black Rock was properly located between November 1 and November 13, 1875.

The Elm Orlu. Plaintiffs recognized the need of independently alleging and proving this location. They alleged the three necessary steps in detail. These were all denied. At the trial plaintiffs undertook the burden of proving them.

Plaintiffs' witness, Warren, saw a hole at the Elm Orlu discovery five days after the location of the Black Rock in 1875. He could not describe the rock at all.

Plaintiffs' witness, Parks, in his oral testimony at the trial, sufficiently proved a discovery at the time of his first visit to the Elm Orlu. There was, however, absolutely no affirmative evidence that the Elm Orlu boundaries were completely marked before 1876. Parks is the only witness who claims to have seen any markings in either 1875 or 1876, for Warren never attempted to fix even the year in which he saw the single stake referred to by him (at the northeast corner). In Parks' deposition taken before trial he never mentioned stakes, vein, or ore. Further testifying on the trial as to his first visit he first fixed it in 1875, then in either 1875 or 1876, he wasn't sure; then he thought in 1875. He didn't know the time of year; it might have been in the summer as he might have been hunting grouse, though he is not sure he was. He had already said he was prospecting around looking for claims. On this first visit he saw but two stakes and they were at the west end. The Poser lode was also located on the same line. On this being brought to his attention he concedes that those he saw may have been Poser stakes. Under pressure on re-examination he then concludes that the stakes he saw were in the same place and the same as those he saw in a later year. He first followed the boundaries around, and saw all the corners of the claim, the year after his first visit. There is no other evidence as to the marking of the boundaries of the Elm Orlu.

The volunteered statement in the deposition of Warren, which was objected to by defendant when made, that the Elm Orlu was located before the Black Rock (Record p. 111) must be utterly disregarded. Aside from the fact that it was not in

response to any question, it is a conclusion by a non-expert on a matter not the subject of expert testimony; and is a bold effort to substitute himself for the court as the trier of one of the chief issues in this case. Had he attempted to give even the date of the location of the Elm Orlu, that would have been incompetent because the facts upon which the conclusion of location must be depend were in issue, and so he could only have testified to the doing of the acts themselves, or the date of their performance. The court had announced that, of the testimony received in evidence, it would only consider such as was competent (Record, p. 94). For like reason, Warren's statement that "it (the Elm Orlu) was located in 1875" must be disregarded.

On the other hand, Warren's testimony that the Black Rock "was located in 1875" (Record, p. 111), is competent; but **only** because the fact of location of the Black Rock was not in issue, it being alleged by the plaintiffs themselves. Thus Warren's statement merely fixed the **date** of the doing of a thing confessedly done—the only question as to that conceded location being the date thereof.

The trial court could not, and did not, positively find any marking of boundaries on that claim before 1876.

Mindful that every presumption on every issue affecting the right of plaintiffs to take ore from beneath the Black Rock surface is against them, and that they must prove every element essential to that right by clear and satisfactory evidence, how could the trial court on the foregoing evidence have found against the defendant owner of the Black Rock surface, a marking of the Elm Orlu boundaries earlier that it did? Surely this court ought not to be asked, upon such uncertain evidence (even in a case where the burden was not such as in this), to make a finding of an earlier date of marking than has been found by the trial court.

It follows that the final step completing the location of the Black Rock was taken not later than November 13, 1875, whereas the final step for the Elm Orlu was not taken until some time in the year 1876. Therefore, even if there had been valid and sufficient notices of location for both of these claims, the Black Rock, as the first completed, would have priority in

antepatent location rights. In the "Creede" case, 196 U. S. 337, 352, this court said:

> "Doubtless a locator does not acquire the right of exclusive possession, until he has made a valid location."

8. The so-called curative act of 1907 (Montana).

Upon this point we simply refer to the main brief.

9. Plaintiffs' "holding and working" allegation as to the Elm Orlu was wholly unproven, and if proven would have been immaterial.

Plaintiffs alleged such a working, etc., of the Elm Orlu for a period commencing April 18, 1875, (the location date declared in the Elm Orlu notice). Upon issue joined plaintiffs attempted to prove these allegations on trial. Deficiencies in their evidence are pointed out in the subhead "holding and working" in the "Statement of Case" in this brief.

Had the trial court found these allegations proven, we would insist that:

> (1) Because not made the basis of the application for patent, such working may not now be relied on to create for the benefit of the patent, an earlier priority, or for any purpose.
>
> (2) The segregation, if the statute provided therefor, would only be complete at the end, and not intermediate of, or at the beginning, of the period of holding.

In the state of this record it is unnecessary to exploit these features at length.

(a) The court found that the allegations were not sufficiently proven. The evidence would not justify, much less demand, a contrary finding by this court.

Neither of the only two witnesses who claimed to have seen the Elm Orlu in 1875, saw any one occupying or working it. There was no proof of any work of any kind done in that year. Plaintiffs admitted that the earliest mining was in 1878. In their brief, in the Circuit Court of Appeals, on page 32, they said:

> "As early as 1878, the owners were actually leasing

> and mining the ground." * * * "The first two or three years after its location nothing is shown, except that the annual labor was done; the monuments and integrity of the location maintained," etc.

The then existing statute (Section 2224 R. S.) required the doing of annual work **on regular locations** to prevent their forfeiture during the twelve months,immediately following the location. By Act of January 22, 1880, Congress amended Section 2224 so that as to claims **located** since May 10, 1872, the obligation to perform work should begin on January 1 next following the date of location; and succeeding periods were thus laid in accordance with calendar years. That amendment had no operating effect prior to its passage.

> 2 **Lindley on Mines,** Third Ed. Sec. 623, pp. 1529-1530.
>
> **McGinnis** v. **Egbert,** 8 Colo., 41.

It will be observed that both the act and the amendment relate in terms to regular locations and the periods were to be calculated from the date of such locations. We are not here concerned with the effect of representation work as such, to avoid assertion of forfeiture through relocation of an original valid claim; but only with a "holding and working",—a condition which only becomes material when there is no regular location in existence. If there was no holding, i. e. occupancy otherwise than by work done, the first work must by its own date determine the commencement of "holding and working." Though it has been ruled by some courts that later work may protect a "holding and working" already initiated, for annual periods during which the work would be performed on regular locations, we know of no decision declaring that the first actual work performed may operate retroactively to initiate a right through "holding and working" at any date before the commencement of the work itself.

The trial court did not find either annual work or any work done on the Elm Orlu, before the year 1878, nor was the period in the year 1878 either found by the court or fixed by the evidence. Independently of the court's finding, there was absolutely no evidence that any work had been done on the

Elm Cliffs before 1877, and no evidence that whatever was done in that year was done or began on or before April 22, 1876.

The so-called discovery hole spoken of by Warren and by Parks cannot be utilized as proof of a working of the claim prior to 1877 for three reasons:

> (a) The Montana statute does in effect did not, as does the present statute, require the performance of any work by a would-be locator in connection with the discovery. If he could find the necessary vein of quartz rock or ore in place with one well defined wall, even though he found it in the native country, or even in a hole theretofore dug by other persons, it was a sufficient discovery upon which to base a location.
>
> Warren v. McNulty, 7 Mont. 30, 37.
>
> (b) There was no proof of any kind that the location of the Elm Cliffs or any of them had either dug the hole or caused it to be dug.
>
> (c) The work of discovery is not related by the statute to any particular period of time, and the gap or interval between the discovery work, had it been done by the location, and the work in 1877 would in no-wise break the continuity of work.

Again, in this connection we remind the court that there can be no presumption indulged in in favor of the plaintiffs or any of them because they are endeavoring (by virtue of the fact which they sought to prove and which may not be presumed in their favor) to take one from beneath the defendant's surface.

There was no proof of actual occupancy before the lease and deed running from 1877 to July, 1886 (Record, p. 97-102) —unless representation constituted occupancy within the meaning of Section 2332 during the years 1879 and 1877. Nor was there any proof of occupancy in the intervals in those years when representation was not being done. The amount of representation work required was but $100 per year. Such work, if done by one man, would consume from 20 to 30 days, and the period would be shortened in proportion as the number of workmen was increased.

It is held that the mere performance of annual representation work does not constitute such a continuous holding as is essential to satisfy the requirement for adverse possession.

Blake v. **Jones,** 29 Mont. 1;
Hamilton v. **Mason,** 21 Mont. 9;
Power v. **McNally,** 47 Mont. 29.

These decisions defining the requirement of the statutes of Montana as to adverse possession, themselves interpret those statutes.

U. S. v. **Patsone,** 220 U. S. 525, 535.

Either these Montana decisions are controlling, or else the question is one of the construction of the Federal Act only. We feel that the latter is the correct view. **Steele** v. **Flaten,** 210 U. S. 10, 26, 27.

Of the character of possession required to constitute a sufficient "holding and working" in the case of entry under an insufficient location, Mr. Lindley has said:

> "_____but such possession, in order to vest a title under the statute of limitations, must be open, notorious, exclusive and continuous, and not loose, uncertain, scrambling and errant. Any interruption of an adverse possession within the required period prevents the acquisition of title by this method. The acts of mining should not be merely occasional, fugitive and desultory, but as continuous as the nature of the mining ____ customs of the country permit and require."

(2 Lindley on Mines, 3d Ed. Section 668, p. 1219.)

Each of these claims embraced in part a common surface from 1873 forward. There was no continuous mining, save during the leasing period (1879-1882), and the representation work which was limited to the $100 required, was of necessity occasional, and not continuous.

(h) The Lewis Deed.

The deed itself bears date March 20, '76. A second deed bears date December 10, '76. Each granted an undivided

fourth. (Book Exhibits, p. *37*). It adds nothing to the strength of the claim as to holding and working under the federal statute. No possession back of the execution of the deed itself could be regarded as a possession based upon the written instrument, even if such feature were at all material.

(c) **The date of a right by holding, etc.** If such a right could be gained under Section 2332 R. S. before and without patent, it would date as of the time of completion rather than as of the beginning, or intermediate of the holding. The person holding has not at the beginning segregated or gained a grant of any kind. The regular locator who meets all requirements of the law and local regulation, secures a grant of exclusive possession. Why should such a locator, upon adjoining, non-conflicting surface, have any less right by his valid location, to that parcel of vacant public domain, than he would have had if the person "holding" the other surface had not been there at all?

It would seem that if a suit were begun by the owner of the valid location, on account of a split apex, or diagonal side-line departure against the "holder" within, say, sixty days after the beginning of mining by the latter, and within, say, thirty days after location by the former, that the plaintiff should prevail in priority. If the holder could prevail under such circumstances, though not meeting the requirements of the law, he would be given every benefit of a valid location.

The acquisition of water rights presents a somewhat parallel situation. The State statutes usually require posting of notice at point of intended diversion, a record thereof within a definite period thereafter, commencement of work and prosecution with reasonable diligence to completion. A water right claimant failing to observe these requirements, may, nevertheless, obtain a water right upon the completion of his diversion and the application of the water to a beneficial use. But as against other appropriators his right dates from application to use, rather than from initial acts looking toward diversion with result, that during the period of the construction of his ditch or canal any other appropriator may post notice, make the record, and gain priority over him,

though such other does not complete his ditch or canal until long after.

Murray v. **Tingley,** 20 Mont. 260.

If the performance for the required number of years, of $100 worth of work in each year, were to constitute a sufficient "holding and working", and the right of the "holder" were to be related to the beginning of the working, the "holder" not complying would be in better position than the locator complying with the present law, for neither would be obliged to do more annual work than the other, but the "holder" would avoid the expensive discovery work now required of the regular locator, and would go back for priority to the first stroke of his pick, whereas the regular locator would not, as against intervening rights, gain his priority until completion of the third step in the location. Congress could never have contemplated, and should not be held to have declared any such results.

10. Plaintiffs may not go back to any other prepatent claim than the one they used as a basis for their application for patent.

At the time of the Elm Orlu application the Land Office regulations provided:

> "That attached to the field notes must be a sworn statement of the claimant that he has the possessory right therein described, in virtue of a compliance by him (and his grantors, of the claims by purchase) with the mining rules, regulations and customs of the mining district, state or territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly but as clearly as possible **the facts constituting** such compliance, the origin of his possession and the basis of his claim to a patent."

The Elm Orlu patent proceedings disclosed that the applicants made no statement as to "working or holding," and that the basis of their claim was the alleged location referred to in the notice Exhibit "A" to the complaint, which was also said to be the origin of their possession. This alone forbids plaint-

iffs from relying, for pre-patent mining right, upon a "holding or working."

> **3 Lindley on Mines, 3d Edition,** Section 783, p. 1920.
> **Jacobs** v. **Lorenz,** 98 Cal. 332.

Mr. Lindley, in the section just cited, while discussing the doctrine of relation, says (page 1920):

> "For this purpose, and this purpose alone, a patentee may show the date of the location upon which the patent proceedings is based.
>
> "The patentee, in establishing this fact, will necessarily be limited to the location appearing in the patent record. He cannot be permitted to show the existence of any other or prior location."

By parity of reasoning, he cannot show title by "holding and working" when he claimed right to patent by location only, and failed to make the showing that the land office would have required of him if he had claimed by virtue of "holding and working."

11. **Knowledge.** In the Circuit Court of Appeals plaintiffs insisted that the Black Rock locators actually knew all about the Elm Orlu before making the Black Rock location; that a good record could not have imparted more knowledge than they already had; and therefore, they should not be heard to complain of the defective record. They relied on **Yosemite Gold Mining Co.** v. **Emerson,** 208 U. S. 25.

We answer:

> (a) There was no proof and no finding of any staking prior to 1876, though our location was admitted and its date established not later than November 13, 1875;
>
> (b) The trial court only found knowledge of the Elm Orlu discovery and marking on the part of the Black Rock locators from 1876 forward—"**thence forward**" is the precise word used in the finding; (Record, p. 40).
>
> (c) W. A. Clark, a Black Rock locator, now our real adversary, himself disclaims knowledge of the Elm Orlu before 1876, and is silent as to his co-locators;

(d) Warren carries knowledge of a hole and rock on the Elm Orlu surface to locator Belk, but not earlier than five days after the location of the Black Rock; and

(e) The Black Rock location as made was actually hostile to a part of the Elm Orlu surface, and in June, 1880, the Black Rock locators assert, and the Elm Orlu people recognize, their right to that conflicting surface.

It is certain that, the Black Rock locators enjoyed the same right as any other citizen to locate any ground not theretofore segregated by a prior valid location, and to acquire, certainly as to all free surface within the boundaries of their claim, all extralateral rights ordinarily belonging to free surface.

It seems equally certain that there could not be constructive segregation and private ownership of extralateral rights in the Elm Orlu on November 6, 1875, as to some citizen third persons, and no such rights as to others. It could not be public domain as to some but held in private ownership as to others.

If you could dispense with recording in Montana, which is a feature of notice, equally could you dispense with marking of boundaries, which is a physical feature of notice, as well as a physical identification of the claim, so that a mere oral claim publicly asserted in connection with a discovery would be the equivalent of a complete valid location. Thus in an inquiry as to extralateral rights between patents, a quarter or possibly a half a century later, the question of priority of extralateral rights under such patents, involving millions in ore values, might turn on mere oral assertions of claim and oral notice thereof. The Act of Congress does not contemplate any such possibility.

If knowledge on the part of the third party of some step in an incomplete or invalid location by another, were sufficient to protect the latter, forever, without compliance with the law, the United States statute would be set at naught. That statute positively requires marking of the boundaries. Local regulations may be made, under Section 2324 but the same section has the imperative requirement that "the loca-

tion must be distinctly marked on the ground so that its boundaries can be readily traced." It likewise specifies some matters that recorded notices must contain. Notice to or knowledge by third persons, cannot be said to dispense with these requirements, even as against such third persons.

There is no analogy here to notice of an unrecorded deed. In the case of the deed it is valid as between the parties without record; not so as to this conditional grant from the United States. The case would be parallel if the deed contained a condition that title should not vest until some act were done. All the notice in the world would not void that condition.

The record is not meant merely to give notice that a claim of some sort, however defective, is being made. If this were so, actual notice might forever prevent re-location of surface claimed under defective and void records.

The **Yosemite** case is not at all in point. There the relocation was of the identical surface, so that there never could be two valid locations. Here each claim covered chiefly non-conflicting areas, with separate discovery for each on free surface, so that each might have been a valid location if the steps had been properly taken. There the "jumper" re-staked on the morning of January 1st, only because he claimed the annual representation work had not been done on the claim that then covered the ground. Here we located public domain as such. There the "jumper" urged at the trial a failure to post but one notice on the claim, when two were required by miners' rules. Of their very nature such notices could be only temporary, there being no requirement for their replacement or maintenance, and they could only have protected the claim against interference during the very process of discovery and marking of boundaries. Their function, therefore, had entirely ceased long before the attempted re-location, so that as to the "jumper" it was immaterial whether any temporary notices had ever been posted at all.

The Yosemite case was one **sui generis**, and its ruling must be distinguished and limited accordingly.

12. Effect of Failure of the Elm Orlu to adverse the Black Rock earlier application.

When the Black Rock owners included in their application for patent, and claimed surface in conflict with the Elm Orlu, they set in motion a statutory proceeding under Section 2336, R .S., that must necessarily result in a determination of right as between those two claims. In effect they said to the Elm Orlu people:

> "Our right to this piece of mining ground is superior to yours. If you dispute this, adverse us, and if you surrender to this claim of ours, our superior right will be adjudged against you."

Had the Elm Orlu people adversed, they must have claimed this conflict as a part of the Elm Orlu, and the resultant suit would necessarily have determined whether the Black Rock or the Elm Orlu had the superior right. This because of Section 2326, R. S., which, so far as material, reads:

> "It *** (the adverse) shall show the nature, boundaries and extent of such adverse claim. * * * It shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction, to **determine** the question of the **right of possession,** and prosecute the same with reasonable diligence to final judgment;"

That determination must depend on priority of location, at least in the absence of special dealings between the parties. True, only the fraction would be lost by the Elm Orlu, but the ground on which they would lose it and the Black Rock would gain it, would be that of priority.

It appears from the Black Rock patent proceedings, introduced by the plaintiffs themselves, that the Black Rock application was based upon its location and that it claimed this fraction as a part thereof.

These patent proceedings have been likened to a suit to quiet title, with monition to all the world. On settled princi-

ples a default or a judgment suffered in such an action would be a conclusive adjudication.

This application proceeding was the only way in which, in the absence of a known assertion of claim against it, the Black Rock could perpetually insure its rights against loss of evidence with lapse of years. It is significant that nearly forty years ago, when the conditions were fresh and the facts well known to all, the Elm Orlu people refused to face that challenge. Had there been no **surface** conflict, the Elm Orlu people need not have faced that issue, but with the surface conflict, they could not escape it. By surrendering they merely admitted it.

There were no dealings between the respective claimants as to, nor any improvements made by either on the conflict area down to the time of the Black Rock application for patent. (Record, pp. 432-436.) Therefore, there was no basis of claim for either side to the ground in conflict, save only the location of each. When the Elm Orlu claimants surrendered that fraction of the Elm Orlu to the Black Rock, it would seem, under the facts in this case, that such action must have amounted to a recognition by the former of the prior rights of the latter to that surface.

If this be so as to the surface of the fraction, must not that surface of necessity have such prior right to veins apexing therein as would belong to any other surface having like prior right?

This suggests the inquiry: Could there be two sets of priorities in the Black Rock, one superior to that of the Elm Orlu, appertaining to the fraction only, and the other, possibly junior, appertaining to the remainder of that claim? The same question may be asked with respect to a single apex wholly within the Black Rock as patented, but partly within, and partly without, the fraction. Also, as between a branch of a vein apexing in both the fraction and the balance of the Black Rock, and another branch of the same vein apexing in the Elm Orlu between its end planes: could there be two sets of rights, one prior for the apex of the branch within the fraction, the other junior as to the part of the same branch

without the fraction, each as against a single southerly branch in the Elm Orlu?

Is it not rather true that there can be but one single and uniform priority in one location as against another? If this be so, did not the surrender of the Elm Orlu to the claim of the Black Rock with respect to the fraction necessarily operate to establish priority for all time for the Black Rock as a single entire claim against the Elm Orlu?

If this be the true view, then this prior patent of the Black Rock, because it might have been but was not adversed, and because there were no dealings of any sort between the parties, must determine the whole issue of priority in favor of the defendant and require reversal of the decree.

Bunker Hill & Sullivan M. & Co. v. **Empire State M. & D. Co.**, 109 Fed. 538.

Empire State M. & D. Co. v. **Bunker Hill & Sullivan M. & D. Co.**, 114 Fed. 417.

Round Mt. M. Co. v. **Round Mt. S. M. Co.**, 36 Nev. 543.

The **"Bunker Hill"** case and the **"Empire State"** case may be said to have been overruled by the Circuit Court of Appeals in the present case. But the decision of the Supreme Court of Nevada, was made after the decision of this court in the **"Lawson"** case, 207 U. S. 1; and shows that the Nevada court did not regard the question as settled by the **"Lawson"** case.

13. The effect of the failure of the Black Rock to adverse the Elm Orlu application.

By its own patent proceedings two years before, the Black Rock had established its rights. The later application of the Elm Orlu was a proceeding afterward begun to initiate a new patent right. The rights of the Black Rock were already fixed by patent judgment against the Elm Orlu, and it was not only unnecessary, but even improper to thus reopen them.

Above all, the Black Rock could not have so adversed. By previous surrender the Elm Orlu had two years before eliminated all surface conflict between the two claims and thereby made it forever impossible for the Black Rock to adverse any application for patent that the former might make. Having created this condition it may not now ask that the Black Rock be penalized for lack of adverse. Moreover, the Land Office would have no jurisdiction to pass upon the effect of the Black Rock patent. Therefore, the controversy could not properly be presented to that office.

II.

PRIORITY AS BETWEEN THE JERSEY BLUE AND THE ELM ORLU CLAIMS.

All that has been said in Division I of this brief, in Subdivision 8 as to the "curative act," in Subdivision 9 as to "holding and working" (save as to the Lowe deed) in Subdivision 10 as to the restriction to basic claim urged in the patent application, in Subdivision 11 as to knowledge and its effect, and in Subdivision 13 as to failure to adverse the Elm Orlu application applies also as between the Jersey Blue and the Elm Orlu claims, and we ask that it be so treated.

(a) If the holding of the trial court upon the question of priority be reversed, the finding as to the crossing of the Jersey Blue and Rainbow veins must, as a necessary legal consequence, also be reversed, and the decree should award to the defendant all the ore in the unified vein below the point of union, "including all the space of intersection." (Section 2336 R. S.)

The trial court held:

> "In view of all the circumstances and that reasonable and learned men may honestly differ in their interpretation of geological phenomena in these premises, the court is constrained to say the evidence is in equipoise; and so the determination is dictated by the burden of proof. Even as defendant fails to prove the veins unite, so would plaintiff fail to prove they cross, if the burden of proof was upon it. A principle

of law, however, demands that the court shall find that the veins do cross. Defendant alleges they unite, and claims an estate by reason of it. Plaintiff denies they unite, and alleges they cross and admits a different estate in defendant by reason of it. Though defendant fails to prove the union and the estate it claims, the law is it must be awarded the estate that plaintiff admits or concedes to it. And accordingly the finding is that the veins cross, and, save at the intersection, defendant is entitled to all ore bodies in the Jersey Blue south of the Rainbow and wherever it goes or where plaintiff admits it goes, if not otherwise found." (Record, p. 58.)

On pages 45, 46 the same opinion reads:

"Whether the Jersey Blue unites with the Rainbow is the most contested issue. In view of the finding that the Elm Orlu is the older location, each party contends against its own interest. During the trial and argument for defendant, it was admitted that the Rainbow apex crosses the Elm Orlu west end line and the common side line; and that from its apex in the Elm Orlu on its dip it extends under the Black Rock; that the great ore body in dispute west of the apex crossing at the common side line, under both claims and in places bisected on strike by said side line, is in said vein; and that it extends downward to the uttermost depths. These facts are conclusively proven as well. This admission overcomes the common-law presumption that defendant owns that part of that ore body under the Black Rock west of the apex crossing, and imposes upon defendant the burden of proving by a preponderance of the evidence (1) that the Black Rock is the older location, (2) that the Jersey Blue unites with the Rainbow above any part of that ore body by defendant claimed. The whole is a single ore body under both claims, the apex of the whole being in the Elm Orlu. To avoid the otherwise inevitable legal consequences, the defendant must prove the union of veins even as it must prove the estoppel by deed it alleges. And this burden cannot be sustained by leaving the issue in doubt or balance. This is clear in respect to (1) that part of the ore body above the alleged union and under both claims, (2) that part of it below the union and under the Elm Orlu. And so is it in respect to that part of the same ore body below the

union and under the Blackrock. Defendant confesses and avoids. In equity, as in law, if a fact is admitted and another fact is averred to avoid it, the fact admitted is proven, with all its consequences, and stands as though the fact in avoidance had not been averred, unless the latter also is proven. See Clement vs. Nicholson, 6 Wall, 315. Of course, a fact admitted at trial is proven, even as though admitted in answer on oath. Otherwise, perjury in pleadings would be encouraged. And the plaintiff is required to only offset defendant's evidence that the veins unite. It is not required to prove they cross. The question or issue is, Do they unite? — and evidence that they cross is only in support of the denial that they unite. Hence, if upon all the evidence the alleged union is in doubt or balance—in doubt or balance whether they unite or cross—the finding must be that they do not unite, even though the evidence would not warrant a finding that they cross."

Thus it appears that the trial court could not find any preponderance of evidence on this issue and made this finding because of the view taken as to the burden of proof. It follows, that if the burden ought to be placed on the plaintiffs, that the finding should be reversed.

Let us specially note these two features:

First, the respective claim ownerships were admitted by the pleadings, being, in fact, alleged by plaintiffs. Second, the coming together on dip of the Jersey Blue and Rainbow veins, that is to say, the point of beginning of the intersection of the veins (if intersection there be), or of union, (if union there) is under the defendant's surface.

Therefore, at the outset, two rules were operating, in favor of the defendant and to cast the burden upon plaintiffs, viz., (1) the rule of presumption in favor of the surface owner, and (2) the general rule (misapplied by the court) that where the burden is upon a party at the outset upon some issue, it remains upon him throughout—in the sense that he must have a preponderance, considering the whole of the evidence upon such issue—even though the burden or necessity of producing counter evidence may shift, to and fro, during

the progress of the trial. How, if at all, could the conditions be changed so as to put the burden on defendant?

We concede that if defendant were claiming ores under plaintiffs' surface, the presumption would be against it, and the burden of proof upon it as to such ores. But it is not asking for any such finding or decree. Even if it were, we insist that the presumption or the burden, or both, would be against it only as to ores or veins lying within plaintiffs' boundaries. As to ores or veins lying within defendants' boundaries, there would be no reason to change the rule, either of presumption or of burden. It is only to ores and veins within defendants' own boundaries, that this argument is directed.

There can be no excuse for putting the burden upon defendant as to anything within its own boundaries, except the adjudication of priority in favor of plaintiffs. That is not a justification.

What the court said about "confession and avoidance" does not suffice. Indeed, the rules resulting from "confession and avoidance," if correctly applied, would impose or leave the burden upon plaintiffs. For example: A claim owner, whether junior or senior, may follow his vein, as its dip, down into and even through his neighbor's claim. Admission or "confession" by the neighbor that the apex owner was following his own vein shows the point is controverted, would at the trial, establish, in favor of the apex owner, a right to his vein, while it remained distinct and independent. But, suppose his vein intersects or unites with a vein apexing in the neighbor's ground, and this is asserted or admitted by the former. Then, the law steps in and declares that the senior claim owner takes all the ore in the space of intersection (in a case of crossing) or the whole of the united vein below the point of union (if there be union). Sec. 2336, R. S.) So, at that point, his rights attach. No need of further "avoidance" on his part: (For the sake of simplicity we are assuming that the seniority of right and coming together of veins are not in dispute.) Seniority of title and the coming together of the veins once established, they, immediately

of answer. Record, pp. 19-21) denied that any vein opening in the Elm Orlo dipped into the Black Rock.

There is no dispute as to the zoning together of the veins, but according to plaintiffs' own evidence, the veins remain together for a considerable distance downwards.

If we assume priority in favor of defendant, we have operating in its favor, the right of ownership resulting from priority, as well as presumption resulting from surface ownership and the general rule as to burden of proof.

One word more. If the defendant were junior, it would not be interested in proving union. The trial court truly said that in view of its adjudication as to priority, "each party contends against its own interest." There would be no sense in putting on a party, the burden of contending against his own interest, just as there would be no sense in the party's doing so.

With priority secured, defendant contends for its own interest, but still, the correct rules as to burden of proof place the burden on plaintiffs.

It seems evident that, if the trial court had adjudged priority in favor of defendant (I doubt, as a mandatory matter, have held that the burden of proving crossing was on plaintiffs, that they had failed to sustain their contention and that it would have found a union, not a crossing.

With priority in its favor, the defendant is entitled to a finding of union and to everything below the point of union. This applies to the Jersey Blue claim as well as to the Black Rock claim.

Conclusion.

For the reasons urged above, the Black Rock and Jersey Blue claims of the defendant have priority of mining rights over the Elm Orlo claim of plaintiffs. The plaintiffs have failed to establish any right to ore beneath the surface of defendant's claims and the decree rendered by the Circuit Court of Appeals should be reversed with directions to enter a final

decree in favor of the defendant for all the veins and ore bodies in controversy east of the 190 foot plane; and also for all those portions of veins and ore bodies in controversy to the west of that plane and below the points of union with such veins, with proper ancillary relief.

Respectfully submitted,

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December, 1918.

SCHEDULE "A."

ANALYSIS OF CERTAIN DECISIONS ON QUESTION OF PRIORITY.

Hickey vs. **Anaconda Copper Mining Co.**, 33 Mont., 46.
Decided: July 24, 1905. **Disposition:** **reversed.**

1. Patent not conclusive evidence of a valid location before date of application.
2. To have earlier priority in vein rights must affirmatively prove a valid earlier location.
3. Only a valid location segregates vein or surface.
4. Three steps conditions precedent to segregation:
   (a) Discovery;
   (b) Marking boundaries;
   (c) Sufficient recording.

Case very strong in authority on 3 and 4 above.

Baker vs. **Butte City Water Co.**, 28 Mont. 222.
Decided: July 20, 1903. **Disposition:** **affirmed.**

Plaintiff's location notice admitted. Defendant's excluded as invalid. Defendant admittedly in possession, but plaintiff recovered on proof of a valid location.

Baker vs. **Butte City Water Co.**, 196 U. S. 119.
Decided: January 3, 1905. **Disposition:** **affirmed.**

Unanimous.

Opinion by **Brewer, J.**
McKenna, J., sitting.

Cites **"Belk," "Erhardt," "Kendall"** and other cases to point that compliance with State Statutes (not inconsistent with Act of Congress) essential to a valid location.

Non-compliance leaves attempted location invalid, and the ground remains part of the public domain and as such subject to be later located.

Calhoun G. M. Co. vs. **Ajax G. M. Co.**, 182 U. S. 499.
Decided: April 27, 1901. **Disposition:** **affirmed.**

Unanimous.

Opinion by **McKenna, J.**

Plaintiff's (appellee in state court, and **defendant-in-error** here) locations and receiver's receipts antedated defendant's locations. Its patents also antedated defendant's patents; **every** location **was valid.**

The effort was by a locator, whose **tunnel** location was made **after** receiver's receipt, to prove **no discovery.** He had no **ante**-patent right, and before this proof could be material, court must have been prepared to rule that it would make the **plaintiff's patent void.** No third-person-right intervening between location and patent entry. The language as to relation of patent to location must be read in the light of that fact, and accompanying statement that "the patents could not be collaterly attacked." U. S. Supreme Court later so explains it (see **Creede** case, **infra**). In other words, the court was not confronting the question, so often decided in the Belk and later cases, of conditions essential to segregation from public domain by location, where a good location or "the equivalent made **before** application for patent on a hostile claim" asserts rights against the latter's earlier but invalid location. **McKenna, J.**, later concurred in **Baker case.**

There is no conflict between them.

Clason vs. **Matko,** 223 U. S. 646.
Decided: March 11, 1912. Disposition: **affirmed. (Unanimous.)**

Opinion by **McKenna, J.**

Cites and relies on the **Baker** case, **supra,** on constitutionality of statute.

The conflicting claims here were **unpatented.**

Plaintiff's title to the "Bangor" was quieted against defendants (claiming under a location whose record notice lacked a statement required by Arizona Law, viz: that it was a **re**-location of a forfeited claim).

Creede & Cripple Creek M. & M. Co., (plaintiff below) vs. **Uinta Tunnel M. & T. Co.,** 196 U. S. 337; also 119 Fed. 164.

Decided: January 30, 1905. Disposition: **affirmed** (unanimous).

Opinion by **Brewer, J.**

McKenna, J., sitting.

Argued in April, 1904, re-argued January 10, 1905; and on submission before argument of Baker case, which Brewer, J., also decided on January 3, 1905. (p. 339.)

The court states opposing contentions thus:

(a) The lode patent concludes every question as to the location as of the date of discovery (ascertained presumably from the notice).

(b) The patent only so concludes **as** of **the date of its own entry.**

The court holds with defendant for (b) above, as to the **fact** of discovery.

Here the lode notice filed February 1, 1892, averred discovery and location on January 2, 1892; application for patent August 5, 1893; patent December 21, 1893. Tunnel location notice filed February 25, 1892; recited location January 13, 1892. (p. 339.)

The Court says:

"Obviously the parties divide as to the effect of plaintiff's patent. The Circuit Court held with plaintiff; the Circuit Court of Appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it **relates** to the **initiation** of the **patentee's right** and cuts off all intervening claims. It may also be conceded that the discovery of mineral is the initial fact. **But when** did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date, or the acceptance by the government of his assertion as sufficient with other matters to justify the issuance of the patent? Undoubtedly, **so far as the question of time is essential to the right,** the patent is conclusive, but **is it beyond that?"** (Italics ours.)

The court analyzes discovery and location (including recordation), citing the **Belk, Kendall, Erhardt, Baker** and **Sanders** cases.

(On page 352.) After discussing order of steps, the court concludes this immaterial if **all done before other rights have intervened,** but says:

> **"Doubtless a locator does not acquire the right of exclusive possession,** until he has made a valid location," etc.

The very contention made by plaintiffs below with respect to final paragraph in opinion in Ajax case, as to relation to date of location, was made there also. But the court (p. 353) distinguished the case in that no claim was there made of any **intervening** right, and after stating the chronological history, said:

> "In other words the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to **invalidate** them by proof that there had been no previous discovery of mineral. This was refused by the trial court and we sustained the ruling, saying * * * (Then the Ajax language is quoted.) **"An entry sustained** by a patent, is conclusive evidence that **at the time of the entry** there had been a valid location * * * and the decision only went to the extent, that this could not be challenged by one who, at the time of the **entry had made no location** and therefore had acquired no tunnel right. There is nothing in this ruling to conflict with the views we have expressed * * * ."
>
> "If, therefore, the entry and patent do not of themselves necessarily determine the order of prior proceedings, why may not **anyone who claims rights anterior** to the **entry** and dependent upon that order, show as a matter of fact what it was? One not a party to the proceedings between the government and the patentee is concluded by the action of the government **only so far** as that action involves a determination. There is a determination by the fact of entry and patent, that there was, **prior to the entry, a discovery** and **location.** Having been so determined, **third parties may be concluded** thereby." (Italics ours.)

The Court then goes on to consider the possibility

that other matters might actually be presented by the form of the papers on the application for patent or of the pleadings in an adverse claim suit. But if they were, it must be shown.

Lawson vs. **United States Mining Company** (Plaintiff below), 207 U. S., 1.

Decided: October 21, 1907. Disposition: **affirmed** (unanimous).

Opinion by **Brewer, J.**
McKenna, J., sitting.

The common side line between plaintiff's and defendant's patented claims split the broad vein longitudinally on the surface. The Circuit Court of Appeals gave the entire vein to the senior location (plaintiff's). The United States Supreme Court confirms this.

The defendant's claims were first entered for patent and first patented. If there were adverse suits, the records thereof were not put in evidence.

Defendants contended:

"that such priority of entry and patent conclusively establishes the prior right of the owners to this broad vein * * * and is **conclusive** against any present testimony as to the **dates of the locations.**"

The Court (p. 15) refers to the **Creede** case just decided and says:

"In the absence of a record thereof" (the adverse suits) "we **cannot assume that anything** more was decided than was **necessary** to **justify the patents.**" (p. 16) * * * "Without determining what would be the effect of a judgment in an adverse suit in respect to subterranean rights, if any were in fact present and adjudicated, it is enough now to hold, that there is no presumption in the absence of the record that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest, and upon surveys made under the direction of

the United States Surveyor General, and included only ground in respect to which there was no conflict. If the **surface** ground included in an application does not conflict with that of an adjoining claimant, the **latter** is in **no** position to question the right of the former to a patent. * * * While a patent is evidence of the patentee's priority of right to the **ground** described, it is **not** evidence that that right was **initiated prior** to the **right** of the **patentee** of **adjoining tract** to the **ground within his claim.**" (P. 17)

To establish priority in the vein against defendant's earlier patents and entries, plaintiff relied on certain locations made long before those of defendant, supporting them by the recorded notices of location.

Defendants attacked these locations for that it was not affimatively proven that they were in accordance with local rules and customs of miners then prevailing. The **notices** made in 1863 and 1864, and long before the passage of the Act of 1866, recited conformity. There was no proof as to what those rules and customs were. The patents were issued thereon. It did not appear that they opposed any rules or customs. No federal legislation requiring special conditions precedent to a valid location existed and the court declared that the **proof sufficiently evidenced compliance** and established valid locations as of that early date segregating the **broad vein** then from the public domain and lodging the exclusive right of possession in the plaintiff's predecessors. The court says (p. 19):

> "Acceptance by the Government of location proceedings had **before the statute** of **1866** and the issue of a patent thereon, is **evidence** that those **location** proceedings **were in accordance** with the rules and customs of the local mining district."

El Paso Brick Co. vs. **McKnight** (Plaintiff below)
233 U. S. 250.

Decided: April 6, 1914. Disposition: **Reversed (Unanimous)**

Opinion by **Lamar,** J.

McKenna, sitting.

The Brick Company's locations were valid placers and made before 1893. It applied for patents in August, 1905, and got receipt (Receiver's), but was improperly

denied a patent. It again applied in 1906 and was adversed by McKnight on locations made or a relocation made in 1906.

The court, as it had in the **Ajax** case, there being **no intervening** rights, said:

> "The entry by the local land offices issuing the final receipt was in the nature of a judgment in rem * * * and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual work had been done. It also adjudicated that **no adverse claim** existed and that the Brick Company was entitled to a patent."

The comment of the court in the **Creede** case on the language in the Ajax case, applies with full force here.